SUPREME COURT OF QUEENSLAND

CITATION:	*LM Investment Management Limited (in liq) v Bruce & Ors* [2014] QCA 136
PARTIES:	**LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND** (appellant) **v** **RAYMOND EDWARD BRUCE** **VICKI PATRICIA BRUCE** (first respondents) **ROGER SHOTTON** (second respondent) **DAVID NUNN** **ANITA JEAN BYRNES** (third respondents) **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (fourth respondent)
FILE NO/S:	Appeal No 8895 of 2013 SC No 3383 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2013
JUDGES:	Fraser and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the respondents' costs of the appeal.**
CATCHWORDS:	CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where the appellant is the responsible entity of the LM First Mortgage Income Fund ("the Fund") – where the primary judge concluded it was necessary to appoint a person independent of the appellant to take responsibility for ensuring the Fund is wound up in accordance with its Constitution pursuant to s 601NF(1) of the *Corporations Act*

2001 (Cth) ("the Act") – where the primary judge made that appointment upon finding that given the complexity of the winding up, the administrators of the appellant ("the administrators") would not act properly in the interests of members in identifying and dealing with potential issues of conflict – where the primary judge found the appellants had conducted the litigation in a partisan and combative manner, and the administrators had preferred their own interests to those of the Fund – whether those findings and other supporting findings were reasonably open on the evidence – whether setting aside any of those findings vitiates the primary judge's ultimate conclusions

CORPORATIONS – MANAGED INVESTMENTS – RESPONSIBLE ENTITY – where the primary judge found the administrators had acted in a way inconsistent with those owing duties as responsible entity and trustee under the Act, conducted the litigation in a partisan and combative manner, and had preferred their own interests to the interests of the Fund – where the appellant argues those conclusions and supporting findings were not open because they were not put to appropriate witnesses in cross-examination or the appellant was not otherwise given adequate notice to meet those imputations – whether the administrators were cross-examined about those imputations or were otherwise given sufficient notice – whether there was a breach of the rule in *Browne v Dunn* so as to require those findings be set aside – whether setting aside any of those findings vitiates the primary judge's ultimate conclusions

CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where the primary judge found that if the administrators were permitted to wind up the Fund, there would be a real potential for conflicts of interest to arise – where the second respondent argued there would arise actual and not merely potential conflicts of interest – whether the primary judge erred on that basis – where the primary judge concluded that the real potential for conflicts of interest to arise did not of itself make it "necessary" to appoint an independent person to wind up the Fund under s 601NF(1) of the Act – where the second respondent argued the primary judge misconstrued s 601NF(1) and that those potential conflicts did make it "necessary" to appoint an independent person – whether the primary judge erred on those bases

Corporations Act 2001 (Cth), s 253E, s 601FL, s 601FM, Pt 5C.9, s 601NE(1)(d), s 601NF(1)

Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1, cited
Browne v Dunn (1894) 6 R 67, applied
MWJ v The Queen (2005) 80 ALJR 329; [2005] HCA 74, considered

Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110, cited
Re Association of Architects of Australia; Ex parte Municipal Officers Association of Australia (1989) 63 ALJR 298; [1989] HCA 13, cited
Re Orchard Aginvest Ltd [2008] QSC 2, considered
Smith v Advanced Electrics Pty Ltd [2005] 1 Qd R 65; [2003] QCA 432, cited
West v Mead (2003) 13 BPR 24,431; [2003] NSWSC 161, cited

COUNSEL: J C Sheahan QC, with S R Cooper, for the appellant
No appearance for the first respondents
D Clothier QC, with G W Dietz, for the second respondent
G J Witster (*sol*) for the third respondents
W Sofronoff QC SG, with S J Forrest, for the fourth respondent

SOLICITORS: Russells for the appellant
No appearance for the first respondents
Tucker & Cowen solicitors for the second respondent
Synkronos Legal for the third respondents
Australian Securities and Investments Commission for the fourth respondent

[1] **FRASER JA: Introduction** The appellant is the responsible entity of the LM First Mortgage Income Fund ("the Fund"). It challenges an order made in the Trial Division pursuant to s 601NF(1) of the *Corporations Act* 2001 appointing a person independent of the appellant to take responsibility for ensuring that the Fund is wound up in accordance with its constitution, and related orders.

[2] The business of the Fund was to invest by lending on the security of mortgages to borrowers who developed real property. There were three "feeder funds" to the Fund, one controlled by Trilogy Pty Ltd ("Trilogy") as responsible entity and two controlled by the appellant as responsible entity. One of the latter two feeder funds was called Currency Protected Australia Income Fund ("CPAIF"). There was also a service company to the funds, LM Administration Pty Ltd ("Administration"). The Fund was established in 1999 and by February 2008 it was apparently worth more than $700,000,000. Its fortunes subsequently waned. By the end of 2012 its assets had declined to $320,000,000. The assets were loans made to borrowers. All of the loans were in default. The net loss attributable to unit holders was then $88,000,000. The appellant, as responsible entity of the Fund, had embarked upon an orderly sale of Fund assets and a pro rata distribution of the net proceeds to unit holders. Deutsche Bank AG appointed receivers over the assets and undertakings of the scheme in July 2013. It was expected that Deutsche Bank would recover the money owing to it (about $30,000,000) leaving significant assets still in the scheme.

[3] The appellant suspended redemptions in 2009. The present voluntary administrators of the appellant, Ms Muller and Mr Park, were appointed to the appellant as responsible entity of the Fund on 19 March 2013. By the time of the hearing in the Trial Division it was anticipated, as subsequently occurred, that the appellant would be placed in liquidation with Ms Muller and Mr Park as liquidators. The primary judge accepted that the administrators were independent of the appellant's previous directors. Ms Muller and Mr Park were also appointed as voluntary administrators to Administration, but on 26 July 2013 liquidators unconnected with them were appointed to Administration at a meeting of its creditors.

[4] The proceeding in the Trial Division was commenced by an originating application in the name of the first respondents, Mr and Mrs Bruce. They were nominal applicants, the real applicant being Trilogy. The order sought was that Trilogy be appointed as a temporary responsible entity of the Fund in place of the appellant, pursuant to ss 601N and 601FP of the *Corporations Act* 2001 and a regulation. The primary judge dismissed that application on the ground that it was incompetent and also held that it would in any event have been inappropriate to make the order sought by Trilogy. No party challenges that order.

[5] The second respondent, Mr Shotton (a unit holder in the Fund), and the fourth respondent, ASIC, applied for orders winding up the Fund and for the appointment of a person under s 601NF(1) to take responsibility for ensuring that the Fund was wound up in accordance with its constitution.

[6] The hearing occupied three days. Subsequently, the primary judge ordered that, subject to further orders, the appellant in its capacity as a responsible entity for the Fund wind up the Fund. The winding up order is not contentious. The appellant's challenge is to the order made by the primary judge under s 601NF(1) that Mr David Whyte be appointed to take responsibility for ensuring that the Fund is wound up in accordance with its constitution, and the further orders made under s 601NF(2) on the application of ASIC appointing Mr Whyte as the receiver of the property of the Fund and conferring broad powers upon him as receiver to ensure the realisation of the property of the Fund.

[7] Mr Shotton and ASIC resisted the appeal. The other respondents did not play an active part in the appeal. No separate argument was directed to the appropriateness of the orders under s 601NF(2). The fate of those orders turns upon the fate of the order under s 601NF(1). Accordingly, these reasons concern only the order made under s 601NF(1).

Statutory context

[8] Part 5C.9 of the *Corporations Act* 2001 regulates the winding up of registered schemes. Provisions are made for winding up of a registered scheme where that is required by the scheme's constitution (s 601NA), where the members of the scheme want it to be wound up (s 601NB), and where the responsible entity of the registered scheme considers that a purpose of the scheme has been or cannot be accomplished (s 601NC). Provisions are also made for winding up by order of the Court where the Court thinks it is just and equitable to make the order or where execution or other process on a judgment, decree or order of a Court in favour of a creditor against the responsible entity of the scheme in that capacity has been returned unsatisfied (s 601ND). (In this case the winding up order was made on the just and equitable ground). Where the scheme must be wound up, s 601NE(1) requires that the responsible entity of the registered scheme "must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2)...".

[9] The critical provision for the purposes of this appeal is s 601NF(1). Section 601NF provides:

> "(1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if

the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).

(2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme's constitution are inadequate or impracticable).

(3) An order under subsection (1) or (2) may be made on the application of:
(a) the responsible entity; or
(b) a director of the responsible entity; or
(c) a member of the scheme; or
(d) ASIC."

The primary judge's conclusions

[10] The primary judge accepted that under Pt 5C.9 of the Act, it is generally the responsible entity which will be responsible for winding up the scheme in accordance with its constitution. Taking that into account, the primary judge held that the power conferred upon the Court to appoint a person other than the responsible entity to take responsibility for the winding up of a scheme "if the Court thinks it necessary to do so" was "more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so."[1]

[11] Before the primary judge, Mr Shotton and Trilogy argued that if the present administrators of the appellant were to wind up the fund they would face actual and potential conflicts of interest. The primary judge did not find any actual conflict of interest but found that there was real potential for conflicts of interest to arise. The primary judge held that although the potential conflicts made it preferable and "desirable" for an independent liquidator to be appointed, there was no power to make an order under s 601NF(1) because such an appointment was not necessary on that basis.[2]

[12] The primary judge concluded that what did make such an order necessary was that in this winding up of some complexity where conflicts might well arise, the administrators might not act properly in the interests of members of the Fund in identifying the issues or in dealing with them. That conclusion was based upon findings that, by the administrators' conduct in relation to a meeting of members, their dealings with ASIC, and their conduct in the litigation, they had "demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*" and had "preferred their own commercial interests to the interests of the Fund".[3]

Issues in the appeal

[13] The main arguments advanced by the appellant are that the primary judge erred in making those findings because the administrators were not confronted with the

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1 *RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192 at [47].
2 [2013] QSC 192 at [117].
3 [2013] QSC 192 at [117].

imputations in cross-examination and the findings were in any event not supported by the evidence. Pursuant to a notice of contention Mr Shotton argued that, contrary to the primary judge's conclusion, the power to make an order under s 601NF(1) was enlivened by conflicts of interest which the appellant would or might face in the winding up and the power should have been exercised on that ground.

[14] Before discussing those and the other issues it is convenient to summarise the primary judge's conclusions about the administrators' conduct.

Conduct of the administrators in relation to the 13 June 2013 meeting and their dealings with ASIC

[15] The first respondents filed their originating application for the appointment of Trilogy as temporary responsible entity of the Fund on 15 April 2013. At a meeting on 23 April between ASIC and one of the administrators (Ms Muller) and the administrators' solicitors, the administrators' solicitors suggested that the administrators could call a meeting of members to consider the appointment of a new responsible entity, and that in a choice between the appellant and Trilogy, the appellant "would win".[4] ASIC suggested the use of an enforceable undertaking issued by ASIC to oblige the administrators to call a meeting to vote on resolutions for the appointment of a new responsible entity or that the funds be wound up. ASIC told the appellant that it planned to intervene in the proceedings and that, if there were agreement upon the terms of an enforceable undertaking, ASIC would support the appellant remaining as responsible entity.[5] On the following day, 24 April 2013, ASIC forwarded a draft enforceable undertaking to the administrators' solicitors for the purpose of discussion. The draft provided for the administrators to undertake to call meetings of the members of the Fund and to put to the unit holders for determination resolutions for the appointment of a responsible entity over each fund, whether the Fund should be wound up, and if so, by whom. ASIC sought the appellant's comments and any proposed amendments.[6] The administrators' solicitor told an ASIC solicitor that he would send a re-drafted version of the undertaking to ASIC.[7]

[16] Also on 24 April, the first respondents' solicitor informed the administrators that the first respondents would seek to have their application for the appointment of Trilogy heard on 29 April 2013. The appellant then issued a notice of meeting of members and a covering letter on 26 April 2013. It informed ASIC of this but it did not give ASIC the material sent to the members. The notice of meeting proposed resolutions as extraordinary resolutions which differed from those in ASIC's draft:

> "Resolution 1...
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> ...
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> "That, subject to the passage of Resolution 2, LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 be removed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."
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> Resolution 2...
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> ...

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4 [2013] QSC 192 at [57].
5 [2013] QSC 192 at [58].
6 [2013] QSC 192 at [59].
7 [2013] QSC 192 at [60].

> "That, subject to the passage of Resolution 1, Trilogy Funds Management Limited ACN 080 383 679 be appointed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288.""[8]

[17] The primary judge pointed out that the notice did not deal with the question of winding up as had been sought by ASIC and dealt with the question of who would be the responsible entity much more specifically than had been proposed by ASIC. The primary judge found that the administrators' conduct contradicted ASIC's expectation that the administrators would work with ASIC about what would be put to the meeting and the statement by the administrators' solicitors to ASIC's solicitor on 26 April that he would send a re-drafted version of the enforceable undertaking to ASIC.[9] The primary judge also found that on 29 April 2013 the appellant informed ASIC that it was not willing to enter into an enforceable undertaking.[10]

Misleading representations by the administrators

[18] On 8 May 2013 ASIC sought from the appellant's solicitor an explanation about various matters raised in the notice of meeting and associated documents. Three matters assumed significance at the hearing in the Trial Division.

[19] First, the appellant represented that holding a meeting would save legal costs in relation to the Trilogy application. The introduction to the notice of meeting referred to the application and stated that the appellant "wishes to avoid the costs and delay of multiple court appearances, perhaps appeals, and multiple meetings which are the practically inevitable result of Trilogy's Court application". In addition, material which the appellant distributed to members of the scheme included a statement that:

> "... in a recent court action involving another Fund managed by [the appellant] where there was a proposal to change the Trustee, the court ordered that the full legal costs of each party to the court proceedings should be met from the assets of the underlying Fund (even though the lawyers had promised they would not charge their clients). Thus by calling a meeting to vote on the appointment of Trilogy as a replacement Responsible Entity, [the appellant] is also cognisant that such a move is likely to save significant legal costs for the Fund."

[20] The primary judge found that no convincing explanation was provided by the appellant in its solicitor's letter of 10 May 2013 in response to ASIC's detailed letter of 8 May 2013 asking for an explanation. (I interpolate that the appellant argued that when it published the notice of meeting, the Trilogy application had been made but the applications by ASIC and Mr Shotton had not been made; it was expected that the Court would adjourn Trilogy's proceedings until after the meeting and that the results of the vote at the meeting would inform the proceedings; and it was thought possible that the first respondents might discontinue the application for the appointment of Trilogy and that certainly would occur if the meeting resolved to appoint Trilogy. However, as the primary judge pointed out, legal costs would have been saved by calling a meeting only if the meeting voted to appoint Trilogy as

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8 AB 2308.
9 [2013] QSC 192 at [60].
10 [2013] QSC 192 at [61].

a temporary responsible entity, the notice did not say that, and the appellant strongly urged the members against such a result. In this respect the notice was misleading, as the primary judge found.)

[21] Secondly, the appellant represented that its ability to use "claw-back provisions" in Pt 5.7B of the *Corporations Act* 2001 was a point which differentiated it from Trilogy in relation to the Fund. In material distributed to the members the administrators referred to the prospect of a winding up and stated:

> "If [the appellant] is wound up, its liquidators will have access to the claw-back provisions of the Act – for example, recovery of unreasonable director-related transactions etc. There is room for debate as to whether these provisions could be invoked for the benefit of the Fund; and the administrators have not yet completed the investigation as to any transactions which might be available for the benefit of Members. On 12 April 2013, the Chief Justice extended the time for the administrators to convene a second meeting of creditors until 25 July, 2013.
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> While those matters are not clear, what is clear is that if Trilogy replaces LM as the Responsible Entity of the Fund, it will have no access at all to those provisions for the benefit of Members."[11]

[22] The primary judge found that the notice was misleading in this respect and that the appellant's solicitor's 10 May letter provided no convincing explanation for the representation.[12]

[23] Thirdly, the administrators represented that ASIC had approved the appellant's calling of the meeting. The introduction to the notice of a meeting included the following statement:

> "The Meeting is being called by LM Investment Management Limited (Administrators Appointed), the current Manager of the Fund (LM). LM decided to call the Meeting because, following receipt from two unit holders of an application to the Supreme Court of Queensland for Trilogy Funds Management Limited (Trilogy) to be appointed as the Manager of the Fund in replacement of LM, and immediate consultations with ASIC, LM wished to consult Members in the proper forum, with adequate notice."[13]

[24] The 10 May letter simply rejected ASIC's concern about this. The implication that the appellant had ASIC's sanction for holding a meeting was misleading.[14]

Continuing misrepresentations by the administrators

[25] ASIC asked the appellant to issue an amended notice of meeting which addressed its concerns. On 21 May 2013 ASIC asked the appellant's solicitor to adjourn the meeting until after the applications by Trilogy, ASIC, and Mr Shotton had been heard or to cancel the meeting. ASIC's expressed view was that the vote at the meeting would not impact on most of the claims in the litigation so that the meeting would not result in savings in costs, delay or uncertainty. ASIC also questioned the applicability of s 601FL of the *Corporations Act* 2001 upon which the administrators relied as the legal basis for convening the meeting.

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11 [2013] QSC 192 at [53](f).
12 [2013] QSC 192 at [66], [77].
13 [2013] QSC 192 at [52] (the underlining was in the judgment).
14 [2013] QSC 192 at [66], [75].

[26] On 6 May 2013 Trilogy's solicitor sent a letter to the appellant's solicitor which "set out clearly, succinctly, and... correctly, the reasons why ss 601FL and 601FM of the Act do not allow the proposed meeting ...".[15] The letter explained that s 601FL authorised a meeting only where the responsible entity wanted to retire (which was not the case) and s 601FM applied only where members of a registered scheme wanted to remove the responsible entity, and no scheme member sought a meeting for that purpose. Nevertheless, the appellant's solicitor's letters to Trilogy's solicitor on 8 May and to ASIC on 27 May confirmed that the appellant relied on those sections as the legal basis for calling the meeting.

[27] The appellant declined to adjourn or cancel the meeting. The administrators emphasised the contention, repeatedly made to the scheme members, that the members had a democratic right to determine who should manage the Fund. The appellant's solicitor conveyed that the meeting would be adjourned only to permit further explanatory material to be considered by members. There were subsequent exchanges of correspondence but, although the appellant's solicitors denied that the statutory provisions upon which the appellant relied did not authorise it to call the meeting, no sensible explanation of that view was advanced. The primary judge observed that the appellant's solicitors "made little attempt to meet the legal substance of the points advanced against them, but would not concede the point".[16] Thereafter, Trilogy unequivocally communicated its view that the meeting was not validly called. It communicated that it would not consent to be appointed at such a meeting. It encouraged members of the feeder fund of which it was the responsible entity, who comprised approximately 20 per cent of the membership of the Fund, not to participate in the meeting. It asked the administrators to abandon the meeting.

[28] On 27 May 2013 the appellant posted supplementary information on the Fund website. It stated that the main cost saving would occur if Trilogy was appointed as responsible entity, but it again did not acknowledge this was the only case in which costs would be saved. The fact that Trilogy did not consent to being appointed at the meeting was mentioned but no explanation was given as to why there was any utility in the meeting in that context. Furthermore, Trilogy was criticised as being responsible for the significant costs associated with court proceedings instead of a meeting, "particularly so given the Court adjourned the proceedings till 15 July 2013 in part to allow the meeting to run its course".[17] (At the hearing in the Trial Division the appellant conceded that the adjournment was not granted for that purpose.)

[29] The supplementary information stated that the appellant was "solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting. Prior approval of such Notices by ASIC is not required." However, the supplementary information did not inform the members that by this time ASIC had disapproved of the meeting and had asked the appellant to cancel it. The primary judge therefore found that the new information again "did not reveal the true position regarding ASIC's attitude to the meeting".[18]

[30] The 27 May 2013 supplementary information also stated that Trilogy had given the reason for not consenting to being appointed by the meeting as that it believed that

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15 [2013] QSC 192 at [70].
16 [2013] QSC 192 at [70].
17 [2013] QSC 192 at [72].
18 [2013] QSC 192 at [75].

the matter should be determined by the Court, but there was no reference to Trilogy's reliance upon the invalidity of the notice of meeting on the basis that the sections of the Act relied upon by the appellant were inapplicable. The primary judge also found that whilst the 27 May 2013 supplementary information moderated the statements in the notice of meeting about the claw-back provisions, the information was "not as frank as the view provided to ASIC about this on 1 May 2013 [that] "it is at least hypothetically possible"".[19] The primary judge found that the implication that there was a real point of distinction between the appellant and Trilogy in relation to the claw-back provisions remained misleading.

[31] In addition, the primary judge referred to the statement made for the first time in the 27 May 2013 supplementary information that the licence granted by ASIC to the appellant was limited to the provision of financial services "which are reasonably necessary for, or incidental, to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of ... LM First Mortgage Income Fund ...".[20] The primary judge found that, until this time, the information given to members was misleading because it implied that the appellant had a licence to manage the Fund short of a winding up and did not state that, unless the appellant wound up the Fund, it was obliged to appoint another responsible entity.[21] (The statement found by the primary judge to be misleading was made in information originally distributed by the appellant with the notice of meeting:

> "As you may be aware, on 9 April 2013, the Australian Securities & Investments Commission temporarily suspended LM's AFSL for a period of 2 years. However ASIC allowed LM's AFSL to continue in effect as though the suspension had not happened for all relevant provisions of the Corporations Act 2001 (Cth) so as to permit LM, under the control of FTI as Administrators, to remain as the responsible entity of all LM's registered managed investment schemes for certain purposes which include investigating and preserving the assets and affairs of, or winding up, LM's registered managed investment schemes.
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> ASIC's decision to suspend the AFSL but allow LM and FTI to continue in this way, ensures that FTI as administrators may perform their statutory and other duties.
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> LM has, of course, taken legal advice on its position. LM is confident that its AFSL adequately authorises LM through FTI to continue to control the Fund").

The manner in which the administrators organised the meeting

[32] The primary judge found that the process by which the meeting was called was "technical and somewhat artificial" and that the administrators organised for the meeting to be called to consider two resolutions which they opposed.[22] Section 252B of the *Corporations Act* 2001 requires a responsible entity of a registered scheme to hold a meeting of the scheme's members to vote on a proposed special or extraordinary resolution if, amongst other matters, members with at least five per cent of the votes "that may be cast on the resolution" requested

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19 [2013] QSC 192 at [77].

20 Notice by ASIC to the appellant under s 915B(3)(b) of the *Corporations Act* 2001.

21 [2013] QSC 192 at [74].

22 [2013] QSC 192 at [56].

it. However the administrators themselves initiated the meeting. Assuming to act in their capacity as administrators of the appellant as responsible entity of the feeder fund CPAIF, the administrators directed the custodian trustee of CPAIF's assets ("the Trust Company") to request the administrators, in their capacity as the administrators of the appellant as responsible entity of the Fund, to convene a meeting to consider the resolutions. The Trust Company immediately complied with that request by sending to the administrators a request in the terms which the administrators had given to the Trust Company. No underlying investor in the Fund sought the meeting. And the covering letter with the notice of the meeting, the notice of meeting itself, and other material which the appellant distributed to the scheme members about the meeting strenuously advocated against the resolutions proposed by the appellant.[23]

[33] On 28 May 2013 ASIC sought from the appellant's solicitor details of the 26 May 2013 request for a meeting signed for the Trust Company and pointed out that ss 12, 13, 15, 16 and 253 of the *Corporations Act* 2001 (dealing with "associates") might preclude the Trust Company promoting its interests at the proposed meeting. Section 253E precludes a responsible entity "and its associates" from voting their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter "other than as a member". The appellant had an interest "other than as a member", as Ms Muller conceded.[24]

[34] On 4 June 2013, the appellant's solicitor acknowledged, amongst many other matters, that the meeting request was not made at the direction of an underlying investor but at the direction of the administrators in their capacity as administrators of the responsible entity of CPAIF. ASIC responded on 6 June 2013 expressing "grave concern".[25] ASIC contended, amongst other matters, that by operation of s 253E of the *Corporations Act* 2001 votes of the Trust Company would not satisfy the description in s 252B of the votes of members with at least 5% of the votes "that may be cast on the resolution" so that the notice of meeting was void. ASIC also stated that:

> "Aside from the technical arguments you have put forward, erroneously in ASIC's view, as to your clients' entitlement to orchestrate the requisition of the proposed meeting, ASIC is most concerned that your clients would seek to do so in circumstances in which there is no evidence that even a single underlying feeder fund investor was consulted.
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> The unavoidable inference that must be drawn is that Ms Muller and Mr Park coordinated the calling of the proposed meeting in order to achieve a forensic advantage in the Supreme Court proceeding and without any reference to underlying feeder fund investors.
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> It is ASIC's position that the notice of meeting is void, having been issued purportedly pursuant to s 252B of the Act in circumstances in which that provision was not invoked. [For the reasons set out in previous correspondence, the calling of the proposed meeting also does not accord with the requirements of s601FL of the Act. It is immaterial that the proposed resolution(s) might accord with a meeting convened in accordance with that provision. What is clear

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23 [2013] QSC 192 at [50] – [54].

24 [2013] QSC 192 at [85].

25 Letter from ASIC to appellant's solicitors, 6 June 2013, at 2, AB 2187.

> is that the responsible entity of the FMIF does not "want to retire" nor has it set out, in any of the disclosure published either in or subsequent to the Notice of Meeting, "its reason for wanting to retire"].[26]

[35] The primary judge described ss 12, 15, and 16 of the *Corporations Act* 2001 as setting up a "horribly complex scheme for deciding who is an "associate"" and concluded, with reference to *Everest Capital Limited v Trust Company Ltd*,[27] that the Trust Company was not entitled to vote at the 13 June 2013 meeting because it was acting as agent of the appellant and that the appellant and the Trust Company were relevantly acting in concert.

The primary judge's conclusions about the appellant's conduct in relation to the meeting and in its meetings with ASIC

[36] The primary judge expressed the following conclusions about the appellant's conduct in relation to the meeting and its dealings with ASIC. The meeting was a "tactic" aimed at the appellant "seeing off its rival for control" of the Fund, although the primary judge did not interpret that in isolation "as a marker of self-interest".[28] The misleading statements in information given to members raised real concerns. They indicated that the appellant was pursuing its continuing control of the Fund in a manner which was at odds with the interests of members. The choice to not work with ASIC and to not hold a meeting which allowed resolutions about winding up to be put at the same time as resolutions about the responsible entity should be seen in the same light, and the initial failure properly to disclose the true nature of the limited financial securities licence bore upon that point. That "the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions"[29] was demonstrated by conduct which was subsequent to the appellant's initial failures. The appellant refused to moderate its position, except inadequately in the 27 May 2013 supplementary information after Trilogy's lawyers explained why the statutory bases for the meeting upon which the appellant relied did not exist and when ASIC complained about misleading statements in the appellant's material given to members. Where Trilogy did not have a licence to operate as responsible entity and did not consent to do so there was no utility in the meeting as a forum for considering whether Trilogy should be appointed as responsible entity. Ms Muller's evidence in cross-examination about the justification for the meeting that there was an "appreciable chance" that Trilogy would be elected as responsible entity did not reflect her genuine belief once members had been informed that Trilogy did not have a licence to operate as responsible entity and did not consent to do so. In light of the misleading statements in the information provided to members, and the information that Trilogy was not licensed to perform as responsible entity and would not consent to perform as responsible entity if appointed at the meeting, "any objective observer must have doubted the meeting's use even as a poll".[30]

The primary judge's conclusions about the appellant's conduct of the litigation

[37] The primary judge also accepted ASIC's submission that the appellant's conduct of the proceedings had been over-zealous, finding that it was "combative and partisan

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26 AB 2187 – 2188.
27 (2010) 238 FLR 246.
28 [2013] QSC 192 at [86] and fn 25.
29 [2013] QSC 192 at [88].
30 [2013] QSC 192 at [87].

in a way which I see as reflective of the administrators acting in their own interests to keep control of the winding-up of the [Fund], rather than acting in the interests of the members."[31] The primary judge went on to give some examples of that conduct.[32]

Browne v Dunn

[38] I referred earlier to the primary judge's conclusions that, by that conduct of the administrators in relation to the members' meeting held on 13 June 2013 and their dealing with ASIC, and by their conduct in the litigation, they had "demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*" and "they have preferred their own commercial interests to the interests of the [F]und".[33] Some of the numerous grounds of appeal include contentions that those conclusions and the findings from which they were derived should be set aside because they were not put to the administrators or other witnesses in cross-examination. After explaining my conclusions about those contentions in this section of the reasons, I will relate those conclusions to each ground of appeal.

[39] The appellant argued that in light of the seriousness of the imputations found against the administrators, the failure to put those imputations to the administrators in cross-examination contravened the rule in *Browne v Dunn*[34] and required that the findings and ultimate conclusion be set aside. In *MWJ v The Queen*[35] Gummow, Kirby and Callinan JJ described the essence of rule in *Browne v Dunn* as being that "a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit." The appellant quoted from the following passage in the reasons:

> "One corollary of the rule is that judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it. A further corollary of the rule is that not only will cross-examination of a witness who can speak to the conduct usually constitute sufficient notice, but also, that any witness whose conduct is to be impugned, should be given an opportunity in the cross-examination to deal with the imputation intended to be made against him or her."[36]

[40] The rule is a rule of practice designed to secure fairness to witnesses.[37] The purposes of the rule in *Browne v Dunne* which are significant in the present context are to ensure that the party calling the witness is alerted to any need to call evidence to corroborate the witness's evidence and to give the witness the opportunity to rebut a challenge by the witness's own evidence or by reference to the evidence upon which the challenge is based.[38]

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31 [2013] QSC 192 at [89].
32 [2013] QSC 192 at [90] – [96].
33 [2013] QSC 192 at [117].
34 (1894) 6 R 67.
35 (2005) 80 ALJR 329 at 339 [38].
36 (2005) 80 ALJR 329 at 339 [39].
37 *Smith v Advanced Electrics Pty Ltd* [2005] 1 Qd R 65 at 81 – 82 [46], referring to *R v Birks* (1990) 19 NSWLR 677 at 688, 689.
38 *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* (1983) 1 NSWLR 1 at 16, 22, 23; referred to in *Smith v Advanced Electrics Pty Ltd* [2005] 1 Qd R 65.

[41] ASIC referred to Lord Herschel LC's observation in *Browne v Dunn* that the rule applied "upon a point which it is not otherwise perfectly clear that [the witness] has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling…there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it."[39] In *West v Mead*,[40] Campbell J referred to Lord Herschel LC's reasons and subsequent authority before concluding that "the circumstances in which *Browne v Dunn* will require matter to be put to a witness in cross-examination will depend upon the nature of the pre-trial preparation there has been, and whether that pre-trial preparation has been sufficient to give notice to a witness of the submission ultimately intended to be put to the court." ASIC and Mr Shotton argued that clear and detailed notice of the imputations was given in ASIC's outline of submissions delivered before the hearing, in opening submissions at the commencement of the hearing on behalf of ASIC and others, and in the cross-examination of Ms Muller. They also argued that the appellant did not object to the primary judge making the findings but instead acknowledged both in the opening and closing submissions on its behalf that the relevant matters were in issue and should be decided upon their merits.

[42] The trial commenced on Monday 15 July 2013. ASIC served upon the appellant and the other parties an outline of submissions on the preceding Friday. The appellant accepted in its initial outline of argument in this appeal that ASIC's outline delivered on 12 July raised allegations of impropriety,[41] but in the appellant's outline of argument in reply and in oral submissions the appellant argued that ASIC's outline was insufficient to satisfy the rule in *Browne v Dunn*. The appellant argued that ASIC's outline relevantly made the point only that the winding up of the Fund should be carried out by those nominated by ASIC because the zeal of the appellant in responding to the first respondents' application for the appointment of Trilogy distracted the appellant from its proper focus on the interests of the unit holders.[42] The appellant acknowledged that other statements in ASIC's outline "raised issues concerning whether the meeting of members of the [F]und…was likely to be useful…[and] whether it had been properly called [and]…[w]hether they had responded appropriately or quickly enough to ASIC's indication of its position…". The appellant argued that there was no "plain statement that they had breached their duties as administrators or breached their duties as trustees or fiduciaries or officers" and the cross-examiner did not put to Ms Muller that the administrator had preferred their own interests to the interests of members.[43]

[43] The appellant's submissions substantially understated the nature and extent of the imputations of misconduct made against the administrators in ASIC's outline. The context in which that outline was delivered included a statement in a letter from ASIC to the administrators' solicitors of 6 June 2013 that the administrators had an interest in the proposed meeting in relation to Trilogy's application "that would effectively see Ms Muller and Mr Park, in their capacity as administrators of [the appellant], lose the opportunity of acting in the winding up of the [Fund] – a process

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39 (1894) 6 R 67 at 71.

40 (2003) 13 BPR 24,431 at [96] – [98].

41 Appellant's outline of argument, at [8].

42 Transcript, 28 November 2013, at 1-8.

43 Transcript, 28 November 2013, at 1-8, 1-9.

likely to generate significant professional fees for the persons or entity so involved." Similarly, Trilogy's solicitors wrote to the appellant's solicitors on 3 June 2013 that their client was "concerned that your client is furthering its own interest in holding the Meeting, and not those of the members of the Fund…".[44] That the appellant appreciated that this allegation was in issue is suggested by Ms Muller's statement in an affidavit she swore some weeks before the hearing (on 27 June 2013), in which she referred to ASIC's letter and deposed that "…the matter of professional fees formed no part of [Mr Park's] or my reasons in convening the meeting of members."[45]

[44] ASIC's outline delivered before the hearing then set out a series of contentions in support of its claim that it was appropriate to appoint a person independent of the appellant to be responsible for the winding up of the Fund.[46] Relating those contentions to the primary judge's findings which are challenged in this appeal:

(a) The finding that the appellant's conduct in issuing the notice of meeting contradicted ASIC's known expectation that the administrators would work co-operatively with ASIC[47] was foreshadowed in ASIC's outline:

"[20] Instead of providing the enforceable undertaking suggested by ASIC the administrators chose instead, on 26 April 2013, to issue a notice of meeting at which resolutions would be put that the First Respondent be removed as responsible entity and that Trilogy be appointed in its place ...".

(b) The findings that the administrators adopted a technical and artificial process to call the meeting,[48] that calling the meeting was a tactic by the [appellant] which had the aim of seeing off its rival for control of [the Fund],[49] and that the appellant pursued its continuing control of the Fund "in a manner which was at odds with the interests of the members"[50] were foreshadowed in the following passages of ASIC's outline:

"[1](c)(i) the zealousness [sic] of the [appellant's] response to the [first respondents'] application appears to have distracted it from… its proper focus namely, the interests of the unitholders of the [Fund]… " and "(iii) the person(s) responsible for the winding up should be appropriately independent…".

"[14] ASIC is concerned that the zealousness [sic] of the [appellant's] response to the [first respondents'] application has distracted it from its proper focus, namely the interests of the unitholders…";

"[15](a)…the administrator's [sic] purported use of the procedures in Pt 2 G.4 of the Act to fend off the Trilogy challenge was inappropriate" and "(b)… the administrator's [sic] level of engagement in the adversarial process of this proceeding is surprising in the circumstances…".

"[19]…on 23 April 2013 [at the meeting between representatives of ASIC and of the administrators] the solicitor for the [appellant]

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44 AB 1904.
45 Affidavit of Ms Muller, at [79], AB 1077.
46 Submissions on behalf of ASIC, at [52], AB 2536.
47 [2013] QSC 192 at [60].
48 [2013] QSC 192 at [56].
49 [2013] QSC 192 at [86].
50 [2013] QSC 192 at [86].

expressed confidence that if a meeting were called in which unitholders of the [Fund] were given a choice between the [appellant] and Trilogy, the [appellant] would win…".
"[27]…these circumstances lead to the inference that the administrators of the [appellant] sought to utilise the procedure in Pt 2G.4, Division 1 to orchestrate a meeting in respect of which they expected the [appellant] to prevail, not for the purpose of acting upon a genuine request for a meeting by underlying investors in the [Fund], but for the purpose of staving off Trilogy's challenge to its position as responsible entity."
"[40] The [appellant] did not bring the nature and extent of its interest in the resolutions to the attention of the unitholders with full disclosure …". (That paragraph went on to draw an analogy with a director's fiduciary obligation to a company to disclose any benefits which the director might derive from the passing of any resolution at the company's general meeting.)

(c) The findings that misleading statements were made in the notice of meeting and other documents[51] were foreshadowed in a section in ASIC's outline headed "Content of the notice of meeting", including:

"[28] ASIC has expressed concern to the administrators…that a number of statements made in the notice [of meeting] had the potential to confuse or mislead investors…".
"[32] That statement [in the notice of meeting] was misleading"…[in respects including that it wrongly implied that ASIC had endorsed the calling of the meeting].
"[34] That statement [that the appellant was "strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy"]…was likely to mislead unitholders" and a subsequent statement "was itself cast in terms calculated more to proselytise than inform…".
"[42] The notice was neither balanced nor neutral…".
"[37] The notice suggested (at 5) that the calling of the meeting was "likely to save significant legal costs for the Fund". That was never likely to be the result of the meeting, and in the event has proven to be inaccurate."
"[39]…that statement [in the notice of meeting] implied that the potential of a liquidator of the [appellant] to utilise Part 5.7B of the Act, is a genuine point of differentiation between the [appellant] and Trilogy… [but] there was no reasonable basis for drawing that implication".

(d) The primary judge's rejection of Ms Muller's justification for the meeting that she thought at all times up until the vote closed that there was "an appreciable chance" that Trilogy would be elected as responsible entity by the meeting and consequential finding that this demonstrated that the interests of the members of the scheme were

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51 [2013] QSC 192 at [65], [66], [72], [73], [74], [75], [76] and [77] and the reference to "misleading statements" in [86].

not at the forefront of the administrators' thinking[52] was to some extent foreshadowed in the paragraphs of ASIC's outline identified in subparagraph (b) (including the submission in [27] that "the administrators of the [the appellant] sought to utilise the procedure in Part 2G.4, Division 1 to orchestrate a meeting in respect of which they expected [the appellant] to prevail, not for the purpose of acting upon a genuine request for a meeting by underlying investors in the [Fund], but for the purpose of staving off Trilogy's challenge to its position as responsible entity.")

(e) The finding that Ms Muller's affidavit evidence that she wished to ensure that the appellant's conduct "was, to the extent possible, satisfactory to ASIC" was not "consistent with the reality of the [appellant's] interactions with ASIC" was not clearly sought in ASIC's outline, but it reflected the inconsistency between her affidavit evidence and the findings which were sought in ASIC's outline (for example, in paragraph [20]) that the administrators did not in fact co-operate in those respects with ASIC.

(f) The finding that the appellant's conduct in the litigation was combative and partisan was foreshadowed in ASIC's outline:

"[15](b)...the administrator's [sic] level of engagement in the adversarial process of this proceeding is surprising...".
"[47] The [appellant] has...resisted [the first respondents' application]...in a partisan manner". "[48] ASIC is concerned that the zealousness [sic] of the [appellant's] conduct of this proceeding, exemplified by the volume of material filed on behalf of the [appellant] and the scope of the issues sought to be agitated, is disproportionate to the extent to which the interests of unitholders of the scheme are likely to be advanced."
"[50] ... It is surprising therefore that the administrators have been so strenuous with the First Respondent's defence to Trilogy's challenge to its position as responsible entity.
[51] An example of that strenuousness can be found in the commission and preparation, on behalf of the administrators by their solicitors, of the affidavit of Bradley Vincent Hellen... That affidavit, and the report exhibited to it was, in the circumstances in which it was prepared, never likely to provide much assistance to the Court given:
a. the limited information upon which the opinions expressed in the report were based; and
b. the limited relevance of the assumption upon which those opinions were predicated, namely the "maturity" of a contingent liability that was the subject of proceedings in this Court in respect of which judgment had at that time been reserved by Applegarth J. ..."

[45] The following discussion relates to the appellant's challenges to the findings in (a) – (e). The appellant's challenges to the finding in (f) and other findings about the administrators' conduct in the litigation are discussed under headings referring to the relevant grounds of appeal.

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52 [2013] QSC 192 at [88].

[46] There was considerable emphasis in the appellant's argument upon the contention that ASIC's outline did not give the administrators clear and express notice of an imputation that the administrators preferred their interests to the interests of scheme members in the way found by the primary judge. The primary judge's conclusion to that effect is the only finding which is not clearly expressed in ASIC's outline. However, that imputation was implicit in the outline, particularly in the contentions that the appellant was distracted from its proper focus upon the interests of the unit holders, it orchestrated a meeting for the purpose of staving off Trilogy's challenge to its position as responsible entity, and it failed to disclose its interest in the resolutions to the scheme members. Also taking into account the context described in [43] of these reasons, it is difficult to accept that the administrators did not understand well before the hearing that ASIC and the first respondents would seek a finding that the administrators preferred their interests to the interests of members. That this is so is confirmed by subsequent events at the hearing.

[47] In opening the first respondents' case, senior counsel described the administrators' conduct in calling the meeting as wasting the unit holders' time and money and as a good example of "the administrators using the shareholders' time and money to pursue their own personal interests, namely, to preserve their ability to get fees as administrators from administering this company and fund …".[53] In response, the appellant's senior counsel did not object that this was not in issue. Rather, he acknowledged that the first respondents wished to raise an issue "which goes to the motivations of my clients in calling a meeting …".[54] He also observed that the first respondents and ASIC were critical of the administrators in relation to the meeting, and he advanced arguments upon the merits of the serious imputations advanced for ASIC and the first respondents, justifying the administrators conduct as "good corporate governance … notwithstanding all the criticisms that have been raised."[55] He argued that the appellant's conduct in calling the meeting was "perfectly proper".[56] ASIC's counsel opened next. He referred to the dealings between the administrators and ASIC and submitted that the steps taken by the administrators were taken "to protect their position and to ensure that they remain in the fund and that they're not acting in the interests of the members of the fund, and that's why … an independent party should be appointed to wind up the fund."[57] The following opening on behalf of Mr Shotton endorsed ASIC's counsel's further submission that the administrators were "more focused on … maintaining control of the winding up of that fund."

[48] The appellant argued that the cross-examination of Ms Muller by the first respondents' senior counsel did not challenge the statement in her affidavit that fees formed no part of her or Mr Park's reasons for convening the meeting. It was submitted that the cross-examination essentially concerned only two matters: first, that the real reason for calling the meeting was to create evidence that would assist the appellant's response to the first respondents' application for the appointment of Trilogy and, secondly, that Ms Muller was not sincere in her evidence that she believed that there was an appreciable chance that a result of the meeting was that Trilogy would replace the appellant as the responsible entity. Both propositions were certainly put to Ms Muller, but the cross-examiner also put to Ms Muller the matters upon which ASIC relied for the inference that the administrators preferred

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53 Transcript, 15 July 2013, at 1-17.
54 Transcript, 15 July 2013, at 1-21.
55 Transcript, 15 July 2013, at 1-24.
56 Transcript, 15 July 2013, at 1-27.
57 Transcript, 15 July 2013, at 1-31.

their interests to the unit holders' interests. In particular, the cross-examiner put to Ms Muller that calling the meeting was "a ploy" because she thought that she would control the numbers and "get rid of Trilogy",[58] she thought that Trilogy would be defeated and that would "induce Trilogy to depart",[59] the statement in the appellant's solicitor's letter to ASIC on 27 May 2012 that the appellant's objective in calling the meeting was to allow investors to democratically determine who they wished to manage their fund was not true,[60] and the meeting was pursued "to shore up your own position" and "to fend off Trilogy".[61]

[49] Furthermore, contrary to the appellant's argument, senior counsel for the first respondents did cross-examine Ms Muller upon her statement that fees formed no part of her or Mr Park's reasons for convening the meeting. Most of the cross-examination was directed to the various aspects of the administrators' conduct upon which ASIC relied for the inference that the administrators had preferred their own interests to the interests of the scheme members. That amounted to an indirect challenge to the statement. Furthermore, Ms Muller's attention was specifically directed to the relevant paragraph of her affidavit, together with preceding paragraphs in which Ms Muller swore that she believed that there was an appreciable chance that Trilogy "would carry the day",[62] and senior counsel suggested to her that "you are not really being sincere in those paragraphs...because your solicitor had announced at the meeting with ASIC on 23 April the confidence that the resolutions would be defeated and you told ASIC in May that it [sic] the overwhelming majority of the proxies were against the resolutions...". That suggestion inappropriately combined two questions, but no objection was taken. (Ms Muller disagreed with the suggestion.)

[50] The imputations of misconduct were clearly put in the final submissions for ASIC. In particular, counsel for ASIC submitted that the Court should not permit the administrators to conduct the winding up because "there is sufficient for your Honour to be concerned but [sic] that they may not act always in the interests of the unit holders and not in their own interests."[63] Similarly, senior counsel for the first respondents submitted that this was a very clear case of administrators "pursuing their own commercial interest at the expense of members."[64] Senior counsel for the appellant did not object that the primary judge should not consider those and related submissions of misconduct by the administrators. Rather, he acknowledged in terms that ASIC's case included an allegation that the administrators had exercised their powers as fiduciaries to call a meeting for an improper purpose and he met ASIC's case on its merits. Thus, for example, he argued that there was no evidence to support ASIC's complaint that there had been a distraction from the proper focus of the administration of the Fund,[65] that the serious allegations made by ASIC were wrong, that the administrators acted on legal advice, and that the administrators' conduct in arranging the meeting did not amount to evidence of bad faith.[66] That the appellant always appreciated that ASIC and the first respondents sought

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58 Transcript, 15 July 2013, at 1-41.
59 Transcript, 15 July 2013, at 1-42.
60 Transcript, 15 July 2013, at 1-48.
61 Transcript, 15 July 2013, at 1-51.
62 Affidavit of Ms Muller, at [69] and [75], AB 1074, 1075.
63 Transcript, 16 July 2013, at 2-57.
64 Transcript, 17 July 2013, at 3-21.
65 Transcript, 17 July 2013, at 3-44 to 3-45.
66 Transcript, 17 July 2013, at 3-55 to 3-58.

a finding that the administrators had preferred their own interests to the interests of members is also suggested by the appellant's senior counsel's criticism of the submission in paragraph 40 of ASIC's outline (see [44](b) of these reasons) that it reflected an excessive desire to find fault because the interests of the administrators in the appellant remaining the responsible entity were "blindingly obvious".[67]

[51] The appellant contended that ASIC should have given earlier notice of the imputations it made against the administrators. On 7 May 2013 Peter Lyons J directed ASIC to file and serve on all parties by 10 June 2013 a statement identifying the grounds on which ASIC relied for the relief sought in paragraphs 3, 5 and 7 of its interlocutory application, including any contraventions alleged under s 1101B(1) of the *Corporations Act* 2001.[68] Those paragraphs sought orders for and relating to the appointment of receivers "pursuant to section 1101B(1) of the Act".[69] The application under s 601NF(1) was made instead in paragraph 2 of the interlocutory application. ASIC proceeded on the basis that the required statement was confined to the grounds said to justify orders specifically for and relating to the appointment of receivers and it was not required to identify the grounds upon which the other orders were sought. Its statement referred only to a failure by the appellant to lodge a required financial report with ASIC.[70] In other respects, ASIC proceeded on the basis that the relevant grounds were to be identified in the outline of submissions which the same order of Peter Lyons J directed it to it file, and which it did file, on Friday 12 July 2013. ASIC's construction of the directions was not unreasonable. In any event it must have been immediately apparent that ASIC's statement in relation to paragraphs 3, 5 and 7 of its application did not set out the grounds upon which ASIC relied for an order under s 601NF(1).

[52] The appellant pointed out that it was senior counsel for the first respondents rather than counsel for ASIC who conducted the relevant cross-examination of Ms Muller. Those parties sought different orders and advanced separate cases, but it must have been apparent that the first respondents' and ASIC's cases coincided in the respects put by the first respondents' senior counsel in cross-examination. Repetition of that cross-examination by ASIC's counsel would have been a pointless and wasteful exercise. In this case at least, the identity of the party whose barrister conducted the cross-examination does not bear upon the question whether the purposes underlying the rule in *Browne v Dunn* were satisfied.

[53] Contrary to another submission made for the appellant, in the unusual circumstances of this matter the fact that Mr Park was not cross-examined about the imputations of misconduct is not a ground for setting aside the primary judge's findings. The appellant originally did not file an affidavit by Mr Park even though ASIC and the first respondent had given notice in correspondence and in ASIC's outline of serious criticisms of the conduct of the administrators. Ms Muller's oral evidence was completed on the first day of the hearing. Mr Park swore his affidavit on the same day. The appellant's senior counsel made it clear that Mr Park's evidence concerned only different issues recently raised in new submissions for Mr Shotton. Mr Park's affidavit included statements to the effect that Ms Muller had the primary carriage of the administration and that his affidavit responded only to the new issues raised by Mr Shotton. As Mr Shotton argued, the inference is that the appellant was

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67 Transcript, 17 July 2013, at 3-57.
68 AB 2585.
69 AB 2399.
70 AB 2403.

content to meet the imputations of misconduct by relying only upon the evidence of Ms Muller. That explains why the appellant's senior counsel did not at the hearing object that the primary judge should not make any findings adverse to Mr Park. As ASIC argued, if (which was not contended) the administrators' reliance only upon the affidavit of Ms Muller and her answers in cross-examination did not take the best advantage of the opportunities which the rule in *Browne v Dunn* is designed to secure, that does not establish that there was any breach of the rule.[71]

[54] In the result (again putting aside the imputations about the administrators' conduct in the litigation dealt with elsewhere in these reasons), with one arguable exception the primary judge's findings adverse to the administrators were made only after the administrators had been given such clearly expressed notice of the imputations as allowed them the opportunity of responding to them by their own evidence (as Ms Muller did) and any other evidence they might obtain. The arguable exception concerns the primary judge's conclusion that the administrators preferred their own interests to the interests of scheme members. An imputation to that effect was clearly made in ASIC's and Trilogy's solicitors' correspondence before the hearing and it was implicit in ASIC's outline, but notice of it was given to Ms Muller in cross-examination only indirectly, by questioning upon other imputations from which this conclusion was sought to be inferred, and obliquely, by a double-barrelled suggestion in cross-examination about the sincerity of Ms Muller's denial that the administrators were motivated by fees.

[55] If the appellant's conduct of its case were not taken into account, the proper conclusions might be that the rule in *Browne v Dunn* was contravened and that the finding should be set aside because an imputation of this seriousness should have been put in cross-examination in direct and unambiguous terms to each of Ms Muller and to Mr Park. If the administrators had occupied the role of independent witnesses, the manner in which the appellant conducted its case might not have been relevant in deciding whether the rule was contravened, or in deciding whether a contravention required the finding to be set aside,[72] but the administrators were not independent witnesses. Because they controlled the appellant, the appellant's conduct of the litigation should be taken into account.

[56] If the rule in *Browne v Dunn* is breached, the party affected by the breach ordinarily should take that point at the hearing.[73] The administrators could have caused the appellant to seek a remedy at the hearing for the points which the appellant now takes for the first time on appeal. As Gummow, Kirby and Callinan JJ said in *MWJ v The Queen*, reliance on *Browne v Dunn* can be "misplaced and overstated"; their Honours gave the example of a case in which, where the evidence has not been completed, "a party genuinely taken by surprise by reason of a failure on the part of the other to put a relevant matter in cross-examination, can almost always, especially in ordinary civil litigation, mitigate or cure any difficulties so arising by seeking or offering the recall of the witness to enable the matter to be put."[74]

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71 *Re Association of Architects of Australia; ex parte Municipal Officers Association of Australia* (1989) 63 ALJR 298 at 305 per Gaudron J, referring to Deane J's observations in *Sullivan v Department of Transport* (1978) 1 ALD 383 at 403.

72 See *Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor* [2009] NSWCA 287 and *Bale v Mills* (2011) 81 NSWLR 498 at 515 [66].

73 See, for example, *Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor* [2009] NSWCA 287 at [69].

74 (2005) 80 ALJR 329 at 339 [40].

Instead of taking that course, the appellant relied upon Ms Muller's evidence to oppose the findings it now challenges.

[57] The appellant's conduct of the litigation confirms that the administrators did have sufficient notice to meet ASIC's and the first respondents' cases that the administrators preferred their own interests to the interests of scheme members. That should be inferred from an accumulation of circumstances: the clear notice of that imputation in ASIC's and the first respondents' solicitors' correspondence to the appellant's solicitor well before the hearing, the fact that Ms Muller addressed that imputation in her affidavit, the indirect notice of that imputation given in ASIC's outline delivered before the hearing, the clear notice of it given in the openings for ASIC and the first respondents, the oblique notice of it given in the cross-examination of Ms Muller, the unmistakable notice of it given in ASIC's and the first respondents' final submissions, and the appellant's omission to object to the primary judge considering this aspect of ASIC's and the first respondents' cases or to require the administrators to be recalled for the imputation to be put to Mr Park and to be put more clearly and directly to Ms Muller. In those circumstances the essential purposes of the rule in *Browne v Dunn* were fulfilled.

[58] Before leaving this topic I should add that, contrary to what may have been implicit in aspects of the argument for the administrators, the primary judge did not hold that the administrators had breached their duties as officers of the appellant as responsible entity under s 601FD(1)(c) of the *Corporations Act* 2001 to give priority to the members' interests in a conflict between those interests and the interests of the responsible entity (the primary judge did not refer to that provision or express any conclusion in relation to it), or that they had in fact breached an applicable statutory duty, or that they had intentionally preferred their own interests to the interests of the members in a situation in which the administrators were conscious that there was a conflict between those different interests.

[59] I refer now to the grounds of appeal.

Ground 1

[60] Ground 1 in the notice of appeal challenges the primary judge's conclusions that the administrators had demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act* 2001, they had preferred their own commercial interests to the interests of the Fund, the Court could not be assured that they would act properly in the interests of the members of the Fund in identifying conflicts during the course of the winding up or in dealing with those conflicts, and the conduct of the administrators made it necessary that the Court appoint someone independent to have charge of the winding up of the Fund pursuant to s 601NF(1) of the *Corporations Act* 2001.

Ground 1(e)

[61] The first basis of that challenge is expressed in ground 1(e). It is that the first two of those findings were not put to either of the administrators in cross-examination. The first finding is a reformulation of the second finding. This ground of appeal fails for the reasons given in relation to *Browne v Dunn*.

Ground 1(f)

[62] Ground 1(f) contends that none of the findings took into account unchallenged evidence of the administrators that they believed that it was in the best interests of the members of the Fund that the appellant remain the responsible entity and that

the appointment of Trilogy as responsible entity of the Fund was not in the best interests of members (as the primary judge found), and the existence of a reasonable basis for both beliefs in the findings and the evidence. The appellant submitted that the reasonableness of the administrators' belief was demonstrated by evidence that staff of Administration (which was related to the appellant) and the administrators' firm had done a great deal of complex work in familiarising themselves with the Fund assets and in developing strategies to dispose of those assets in a way which achieved the greatest return for members over the shortest period of time, that the administrators had developed a sound working relationship with the secured creditor Deutsche Bank AG, that they had sought to ensure that the bank did not take action prejudicial to the interests of members, and that there was a risk that the proceedings might prompt the bank to appoint receivers (a risk which eventuated shortly before the trial).

[63] The inferences drawn by the primary judge were not inconsistent with the administrators having believed on reasonable grounds that it was in the members' interests that the appellant should not be replaced by Trilogy as responsible entity of the Fund. Rather, those inferences were drawn from the cumulative effect of findings about the particular ways in which the administrators went about responding to Trilogy's challenge.

Ground 1(g)

[64] The remaining paragraph of ground 1, ground 1(g), contends that the findings were not the proper inferences to be drawn from the evidence. That should not be accepted. Those findings were justified by the cumulative effect of the following interrelated circumstances:

(a) The administrators organised the meeting in the circuitous and technical way described by the primary judge.

(b) They did so upon their own initiative, without any request for a meeting by any underlying investor.

(c) They did so in the midst of discussions with ASIC about calling a meeting to consider its initial draft resolutions, where the administrators' conduct had conveyed an intention to cooperate with ASIC in the drafting of those resolutions, and upon giving only perfunctory notice of the proposed meeting to ASIC.

(d) They did so without disclosing the technique they had used in organising the meeting until ASIC later elicited that information from them.

(e) The resolutions in the notice of meeting which the administrators caused to be issued differed significantly from those in ASIC's initial draft. Instead of open-ended questions which allowed the members to decide whether the appellant should remain as responsible entity and whether the Fund should be wound up, the proposed resolutions were framed in a way which ensured that the appellant's appointment as responsible entity would be endorsed if the appointment of Trilogy was rejected.

(f) The administrators then appreciated that it was unlikely that Trilogy would be appointed. (On 23 April 2013 the administrators' solicitor stated to a representative of ASIC that the appellant would prevail in a contest with Trilogy[75] and, in an affidavit sworn on 2 May 2013 in

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75 Affidavit of Ms Hayden, at [14], AB 2290.

support of an application for an adjournment of the hearing of the first respondents' application, Ms Muller referred to the meeting convened for 30 May 2013 and deposed that the "matters of fact that will need to be resolved in the present proceeding include... (e) That a substantial body of members is in favour of the [appellant] remaining as Responsible Entity... (f) That a substantial body of members is opposed to Trilogy becoming a temporary or permanent Responsible Entity...").

(g) The administrators strenuously opposed the resolution for the appointment of Trilogy which they had themselves proposed in the notice of the meeting.

(h) The notice of meeting and other documents included misleading statements, all of which advocated the rejection of Trilogy as responsible entity in favour of the appellant.

(i) The administrators did not adequately modify those misleading statements when they were drawn to their attention.

(j) The administrators persisted with the meeting even when it must have seemed to them to be inevitable that Trilogy would not be appointed because, in addition to the administrators advocating against its appointment, Trilogy itself advocated against it by refusing to accept any appointment purportedly made at the meeting on the grounds that the appointment would be invalid, that Trilogy did not have the necessary licence, and that it did not consent to an appointment made at the meeting.

(k) The grounds for Trilogy's contention that any appointment of it at the meeting would be invalid were explained in clear and cogent terms to the administrators, but the administrators rebutted that contention without advancing any substantial argument to the contrary.

(l) The meeting lacked utility as a poll for use in evidence in Trilogy's proceedings in light of Trilogy's opposition to the resolutions and the misleading statements advocating rejection of the appointment of Trilogy.

(m) Ms Muller repeatedly denied that the primary purpose of the meeting was for use as evidence in the proceedings by the first respondents for the appointment of Trilogy.[76]

(n) Convening and persisting with the meeting involved expenditure, but (subject to (o)) the meeting could save the members the costs of resisting Trilogy's application only if Trilogy were appointed at the meeting, which could not realistically be expected.

(o) The only other way in which costs might be saved by convening and persisting with the meeting was if (as ASIC submitted in its outline delivered before the hearing was the administrators' purpose in pursuing the meeting), the rejection of the resolutions at the meeting deterred Trilogy from pursuing appointment as responsible entity.

[65] The appellant argued that it was entitled to call a meeting of members without first obtaining ASIC's approval. That is so. The appellant as responsible entity of the Fund was empowered by s 252A of the *Corporations Act* 2001 to call a meeting of members, but (as I understood the appellant to accept in argument) the members' power to remove the appellant as responsible entity and appoint a replacement responsible entity by resolution was confined to s 601FL and s 601FM. There was

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[76] Transcript, 15 July 2013, at 1-44, 1-48, 1-52.

in this case no suggestion that there was any other source of power.[77] Accordingly, any vote by the members upon the resolutions proposed in the appellant's notice of meeting could have effect, if at all, only as a poll which the appellant might seek to put in evidence in Trilogy's application – but Ms Muller denied that this was the administrators' motivation in convening the meeting and the administrators maintained throughout the correspondence that the relevant source of power lay in s 601FL or s 601FM.

[66] The appellant also argued that the meeting was not called without prior notice to ASIC. It is correct, as the appellant submitted, that Ms Muller and Mr Russell gave unchallenged evidence that the appellant consulted ASIC before calling the meeting and that ASIC did not object to the appellant calling the meeting, but the evidence nonetheless supports the primary judge's descriptions of the appellant's conduct. The consultation at the meeting of 23 April was accurately described by the primary judge: see [15] of these reasons. It did not concern possible resolutions in the form subsequently published by the administrators. That meeting was followed by ASIC forwarding a draft enforceable undertaking for discussion purposes on 24 April 2013. It contemplated resolutions about the appointment of a responsible entity over the Fund and about whether the Fund should be wound up and, if so, by whom. On 25 April 2013 there were communications between ASIC and the administrators' solicitor, Mr Russell, in which Mr Russell was invited to forward any changes to the initial draft undertaking. Ms Gubbins deposed to a telephone conversation with Mr Russell on the morning of 26 April in which Mr Russell responded to Ms Gubbins' request to forward a proposed amended draft undertaking for ASIC's review by indicating that he should have something for ASIC by lunch time; Mr Russell did not mention that the administrators intended to issue a notice of meeting without further discussion about the draft undertaking.[78] (This was not in issue: senior counsel for the appellant put to Ms Gubbins and she agreed, that Mr Russell ended up by saying that he would send her a fresh draft.[79]) Mr Russell's affidavit evidence did not contradict Ms Gubbins' evidence on that topic. In another affidavit Mr Russell referred to a conversation in the afternoon of 26 April in which he told Ms Gubbins that he had done some work on the draft enforceable undertaking and he had some concerns about it; Ms Gubbins said that the enforceable undertaking was no longer urgent (Trilogy's application had been adjourned from 29 April to 2 May), and that "we could take more time to talk about the terms of the undertaking".[80] In cross-examination by the appellant's senior counsel, Ms Gubbins agreed that her understanding was that the enforceable undertaking was still under consideration on the administrators' side.[81]

[67] As the primary judge accepted, the evidence revealed that the appellant briefly informed ASIC of the notice of meeting, but the appellant did not give ASIC the material sent to members.[82] The consultations could not possibly be regarded as an endorsement by ASIC of the appellant's conduct in issuing the notice of meeting, of doing so in the terms in which that notice was issued, or of interrupting the previous cooperative approach in those respects. The evidence to which the appellant referred justified the primary judge's finding that the appellant contradicted ASIC's

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77 Cf *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* (2000) 158 FLR 121 at 128 – 132.

78 Affidavit of Ms Gubbins, at [6] – [8], AB 2248.

79 Transcript, 15 July 2013, at 1-63, AB 176.

80 Affidavit of Mr Russell, 15 July 2013, at [7] – [12], AB 1507 – 1508.

81 Transcript, 15 July 2013, at 1-63, AB 176.

82 [2013] QSC 192 at [60].

expectation that the administrators would work with ASIC about what would be put at the meeting.[83] As the appellant submitted, there was no legal impediment to the appellant acting in that way. But in the context of other conduct it suggested that "the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions".[84]

[68] It is not helpful to consider the brief submissions made about the power of ASIC to seek an enforceable undertaking and the efficacy of the resolutions as they appeared in ASIC's draft. ASIC put its draft forward only for the purposes of discussion and the discussion was not concluded before it was interrupted by the administrators' unilateral decision to convene a meeting for the members to consider the resolutions framed by the administrators.

[69] In relation to [64](e), ASIC argued that the effect of the resolutions in the appellant's notice of meeting was to "put Trilogy on the spot because the removal of LM depends upon the members being satisfied that Trilogy should be appointed in its stead"; this should be contrasted with the "open question" drafted by ASIC which inquired whether the members wanted the appellant to be removed, for reasons of conflict, for example, and replaced by somebody else.[85] The appellant argued that ASIC's argument was new and in any event could not succeed because the expressed interlinking of the resolutions merely gave express notice to the scheme members of what was in any event required by the *Corporations Act* 2001. The appellant referred to the provision in s 601NE(1)(d) that the responsible entity of a registered scheme must ensure that the scheme is wound up in accordance with its constitution if the members remove the responsible entity by resolution but do not at the same meeting pass a resolution choosing a new responsible entity which consents to becoming the scheme's responsible entity.

[70] The point about the interlinking of the resolutions was not new. The first respondents' senior counsel put to Ms Muller that the two resolutions, which Ms Muller believed were not in the interests of unit holders, were to be put at the meeting, each resolution was dependent upon the other, calling the meeting was a ploy because Ms Muller thought that she would control the numbers and get rid of Trilogy, she thought that Trilogy would be defeated at the meeting and that would induce Trilogy to depart, she would not have put the resolutions to the meeting if there was a risk of them succeeding, nothing put forward at the meeting was considered by her to be in the members' interests, it was not true that the administrators' objective in calling the meeting was to allow investors to democratically determine who they wished to manage their Fund, that could not be true because Trilogy had made it plain that it would not consent to be appointed by the meeting, and the meeting was being pursued to shore up the appellant's position as responsible entity and to fend off Trilogy. The primary judge referred to the interlinking of the resolutions in finding that the appellant unilaterally departed from its foreshadowed co-operation with ASIC by convening a meeting which proposed "much more specific" resolutions than those which ASIC had proposed.[86] The inference that this meeting was a tactic to defeat a rival for control of the Fund was not negatived by the fact that a similarly framed resolution would be required in a different case.

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83 [2013] QSC 192 at [60].
84 [2013] QSC 192 at [88].
85 Transcript, 18 November 2013, at 1-38.
86 [2013] QSC 192 at [60].

[71] In relation to [64](l) and (m), the appellant argued that even if the resolutions were not authorised by s 601FL or s 601FM, the appellant validly called the meeting and the votes cast at the meeting could be used in evidence in Trilogy's application. The appellant emphasised the primary judge's acceptance that the scheme for deciding who was an "associate" within the meaning of s 253E was complex, so that the administrators could not be criticised, and were not criticised by the primary judge, for making an error about that. The appellant also argued that the only possible reason for the administrators' attempt to engage s 601 FL or s 601FM was to make effective any resolution passed by the members to remove the responsible entity and appoint Trilogy in its stead. These arguments do not suggest any flaw in the primary judge's conclusion that the meeting was a tactic to defeat a rival for control of the Fund. The weight of the argument about ss 601FL and 601FM was distinctly reduced by the circumstances that the artifice used by the administrators to organise the proposed meeting came to light only as a result of the active pursuit of the relevant documents by ASIC and that the appellant continued to rely upon ss 601FL and 601FM to justify the meeting without making any serious attempt to rebut Trilogy's arguments against the applicability of those provisions.

[72] ASIC argued that the representations made by the administrators lacked candour and were inaccurate "in ways that it is difficult to ascribe to oversight or mistake."[87] The appellant responded that the evidence did not support a conclusion that the administrators deliberately made the misleading representations. The primary judge did not find that the administrators deliberately mislead the members. Nevertheless, the failure of the administrators to appreciate that their advocacy against Trilogy's appointment was misleading in the rather obvious respects found by the primary judge supports the conclusions that " ...the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions".[88]

[73] The appellant also argued that the primary judge's findings were inconsistent with and did not take into account the evidence given by Ms Muller in paragraph 79 of her affidavit that "...the matter of professional fees formed no part of [Mr Park's] or my reasons in convening the meeting of members".[89] The appellant referred to *Pollard v RRR Corporation Pty Ltd*[90] and argued that the primary judge impermissibly rejected Ms Muller's evidence without grappling with it in the reasons. In the cited paragraph McColl JA said that "[w]here it is apparent from a judgment that no analysis was made of evidence competing with evidence apparently accepted and no explanation is given in the judgment for rejecting it, it is apparent that the process of fact finding miscarried". Ms Muller's evidence on this point was not susceptible of analysis of the kind contemplated by McColl JA. It was in the form of a conclusion which was either correct or incorrect. The detailed evidence about the administrators' conduct in relation to the meeting and their dealings with ASIC did require analysis. That was reflected in the focus upon that body of evidence in the final submissions at the hearing. Ms Muller was cross-examined at length about the administrators' conduct and dealings and her state of mind and the primary judge carefully analysed the evidence and explained in detail why ASIC's and the first respondents' cases should be accepted and the appellant's case rejected. The primary judge's reasons and conclusion sufficiently explained why the primary judge did not accept

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87 Transcript, 28 November 2013, at 1-44.

88 [2013] QSC 192 at [88].

89 Affidavit of Ms Muller, at [79], AB 1077.

90 [2009] NSWCA 110 at [66], a passage quoted with approval in *Coote v Kelly* [2013] NSWCA 357 at [39].

Ms Muller's statement. (I note also that no ground of appeal challenged the judgment on the ground that the primary judge's reasons were inadequate).

[74] Ground 1(g) is not made out.

Ground 2

[75] Ground 2 contends for error in the primary judge's ultimate conclusions on the basis of challenges to some of the findings which informed those conclusions.

Ground 2(a)

[76] Ground 2(a) challenges the primary judge's finding that the administrators' purpose was "to use the meeting as a strategy to defeat or damage Trilogy's prospects on its originating application"[91] or as "a tactic by the [appellant] which had the aim of seeing off its rival for control of [the Fund]"[92] on the ground that those findings were not the proper inferences to be drawn from all of the evidence. This ground fails for the reasons given in relation to ground 1(g).

Ground 2(b)

[77] Ground 2(b) contends that the finding that the appellant pursued continuing control of the Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witnesses in cross-examination and that it was not the proper inference to be drawn from all of the evidence. The first contention fails for the reasons given in relation to *Browne v Dunn*. The second contention fails for the reasons given in relation to ground 1(g).

Ground 2(c)

[78] Ground 2(c) contends that the finding that the appellant's choice not to work with ASIC and not to hold a meeting at a time which allowed resolutions as to winding up at the same time as resolutions as to the responsible entity meant that the appellant was pursuing its continuing control of the Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witness in cross-examination and was not the proper inference to be drawn from all of the evidence.

[79] The first contention invoked non-compliance with the rule in *Browne v Dunn*. That contention fails for the reasons given under that heading. In relation to the second contention, the appellant's dealings with ASIC formed only one of the many circumstances from which the primary judge inferred that the appellant pursued its continuing control of the Fund in a manner which was at odds with the interests of the members. The first contention fails for the reasons given in relation to ground 1(g).

Ground 2(d)

[80] Ground 2(d) challenges the primary judge's rejection of Ms Muller's evidence that there was "an appreciable chance" that Trilogy might be elected at the 13 June 2013 meeting. Ground 2(d)(i) contends that Ms Muller was not cross-examined on the facts about which she gave evidence as the basis for her belief and ground 2(d)(ii) contends that there was no evidence which controverted those facts.

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91 [2013] QSC 192 at [51].

92 [2013] QSC 192 at [86].

[81] As ASIC argued, both contentions are based upon the false premise that Ms Muller's evidence concerned her state of mind when the administrators caused the meeting to be convened. The primary judge's finding was expressly related to the later time when members had been informed that Trilogy did not have a licence to operate as responsible entity and did not consent to do so. The relevant part of Ms Muller's affidavit appeared under a heading "The Meeting of Members held on 30 May 2013". The appellant's submissions identified the relevant facts as those set out in paras 69, 76 and 77 of her affidavit. Those alleged facts were that, as a member of the fund, Trilogy was entitled to attend a meeting of members and advocate and vote for its own appointment; it had become the responsible entity of a related fund earlier upon a vote of the members of that fund; it was interested in becoming the responsible entity of the Fund; a mortgagee of one of the member's units in the Fund might have exercised its security rights to vote in favour of Trilogy; and Trilogy might have made various legal arguments about its and others' entitlements to vote. Ms Muller summarised her resulting belief as being that:

> "...**before convening the meeting,** I believed that there was an appreciable chance that Trilogy may have responded to the Notice of Meeting (including by litigation either before or after the meeting) to secure voting rights in respect of approximately 45% of the required vote and, in that event, it may easily secure the requisite 50% majority."[93]

[82] The first respondents' senior counsel asked Ms Muller when she held her belief in that respect. She responded that she held the belief "right up until the time that the votes closed".[94] Ms Muller was then cross-examined about her state of mind at the time specified in the primary judge's finding. Senior counsel for the first respondent cross-examined Ms Muller in detail upon the appellant's solicitor's letter of 27 May 2013. Ms Muller disagreed that the purpose in calling the meeting was to get evidence for the court. It was put to her that **by this time** she already knew that Trilogy was not going to participate in a meeting. Her response was that they might have changed their mind, but she could not identify any facts which might support that view. When it was put to Ms Muller that it could not be true that the appellant's objective in calling the meeting was to allow investors to democratically determine who they wished to manage their fund because Trilogy had made it plain they would not consent to be appointed at the meeting, she responded that Trilogy could have consented after the results of the vote, but she acknowledged that there had not been any facts to suggest that Trilogy had changed its view.[95] The primary judge was entitled to treat those answers as unconvincing. In cross-examination on subsequent correspondence, it was put to Ms Muller that the proxies received before the meeting were overwhelmingly against the resolutions. Her response was that she did not know whether Trilogy might place a number of proxies at the last minute. That too seems unconvincing.

[83] It was put to Ms Muller in terms that "the meeting was being pursued to shore up your own position...to help... to fend off Trilogy". Ms Muller denied that. It was put to her that the administrators' true motive was "to achieve a forensic advantage in these proceedings". After further detailed cross-examination upon the correspondence it was put to Ms Muller that she was not being sincere. Ms Muller agreed that she did not tell the members of the Fund that the administrators had organised the Trustee to requisition the meeting or that ASIC's view was that the

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93 Affidavit of Ms Muller, at [78], AB 1076 (emphasis added).

94 Transcript, 15 July 2013, at 1-54.

95 Transcript, 15 July 2013, at 1-48, 1-49.

meeting was void, had been called for an ulterior purpose, and should be cancelled. She agreed that this could have affected the members' voting. Her explanation was that "...in my view, my solicitors were still working with [ASIC] right up until the day of the meeting in relation to disagreeing with their position...".[96] That the administrators' solicitor expressed disagreement with the statements made by ASIC is not a persuasive explanation for the administrators' failure to correct the misleading impression conveyed to the members that ASIC was not opposed to the meeting.

[84] Ms Muller denied the suggestion that she was not sincere in her statement that, up to the time when the voting closed, "I believed that there was an appreciable chance that Trilogy would carry the day".[97] When it was put to her that she was not being sincere because she knew that the overwhelming majority of proxies were against Trilogy and she knew what her solicitor had stated to ASIC on 23 May (that the overwhelming majority of the proxies were against the resolutions), Ms Muller responded that those were just the proxies which had been received and "a substantial amount of proxies could be received which would exceed the number that had been received...".[98] The appellant relied upon this answer and upon what was submitted to be the absence of evidence contradicting Ms Muller's statements forming the factual foundation for her opinion. The primary judge was entitled to consider that the mere assertion of a possibility that the trend of proxies might be reversed was unpersuasive.

[85] The statements of Ms Muller identified in the appellant's argument concerned Ms Muller's state of mind at the earlier time when the meeting was called. Thus, for example, Ms Muller's statement that, for various reasons, she believed that Trilogy "was well able to promote its case for election to members"[99] had been superseded by Trilogy's subsequent conduct in advocating against its own election and stating that it did not consent to appointment, it did not hold a requisite licence, and it considered that the meeting was invalid. The same was true of the other paragraphs in Ms Muller's affidavit upon which the appellant relied. They depended upon a view that Trilogy might take steps designed to procure its appointment at the meeting,[100] a view which was well and truly falsified by Trilogy's subsequent conduct.

[86] The evidence to which the primary judge referred justified the primary judge in rejecting Ms Muller's evidence that there was an appreciable chance that Trilogy would be elected at the 13 June 2013 meeting. Nor was there any contravention of the rule in *Browne v Dunn* in that respect.

Ground 2(e)

[87] Ground 2(e) contends that the finding that the interests of the members were not at the forefront of the thinking of the administrators was not put to the administrators in cross-examination and was not the proper inference to be drawn from all of the evidence. The first contention fails for the reasons given in relation to *Browne v Dunn.* The second contention fails for the reasons given in relation to ground 1(g).

Ground 2(f)

[88] Ground 2(f) contends that the findings in relation to the meeting failed to have sufficient regard to the desirability of ascertaining the views of the members as to

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96 Transcript, 15 July 2013, at 1-53, line 20.
97 Affidavit of Ms Muller, at [15], AB 1075; Transcript, 15 July 2013, at 1-54, lines 20 – 41.
98 Transcript, 15 July 2013, at 1-54.
99 Affidavit of Ms Muller, at [69], AB 1074.
100 Affidavit of Ms Muller, at [76] and [77], AB 1076.

which entity they wished to act as responsible entity of the Fund. The primary judge did have regard to that matter, ultimately finding that "any objective observer must have doubted the meeting's use even as a poll".[101] That finding was correct for the reasons given by the primary judge. In any case, Ms Muller repeatedly denied that the administrators were motivated to convene the meeting for the purpose of ascertaining the members' views for use as evidence in the court proceedings.

Ground 2(g)

[89] Ground 2(g) contends that the primary judge erred in failing to have regard to the consideration that once a meeting was called the responsible entity had no power to cancel the meeting. The appellant referred to the provision in s 252A of the *Corporations Act* 2001 that a responsible entity of a registered scheme may call a meeting of the scheme's members and argued that, the meeting having been relevantly called, the appellant had no power to cancel it.

[90] The administrators had confirmed in their solicitors' correspondence of 27 May 2013 that they relied upon ss 601FL and 601FM as the legal basis for the meeting. They did not invoke s 252A or any legal impediment to cancelling the meeting. Rather they insisted upon the meeting proceeding in the face of cogent arguments, with which the administrators did not engage in a meaningful way, which suggested that the meeting was pointless and a waste of the members' time and money.

Ground 2(h)

[91] Under ground 2(h) the appellant contended that the primary judge failed to have regard to the activities of two firms of solicitors in relation to issues concerning the 13 June meeting. The appellant argued[102] that the reasons and ASIC's submissions on appeal did not explain a series of events established by the evidence:

> "(a) the retainer of solicitors by the administrators to assist them to draw and settle the meeting materials and in their dealings with ASIC;
>
> (b) numerous statements by the solicitors in the correspondence that they wished to cooperate with ASIC;
>
> (c) Norton Rose's request to meet with ASIC to restore good relations;
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> (d) Mr Russell's and Ms Muller's evidence that he was not instructed to refuse any undertaking;
>
> (e) Mr Russell's evidence that he would have advised against such a course;
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> (f) Mr Russell's contemporaneous reports to the administrators and counsel after his last conversation with Ms Gubbins before the hearing on 2 May, 2013;
>
> (g) Mr Russell continuing to work on the terms of the draft EU after that conversation;
>
> (h) the immediate attempt to settle the terms of the draft EU with ASIC, once Mr Russell learned that ASIC did want the undertakings;
>
> (i) why evidence of Ms Muller was rejected;
>
> (j) why evidence of Mr Russell was rejected."

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101 [2013] QSC 192 at [87].

102 Appellant's outline of argument in reply to that of ASIC, at [20].

[92] Subparagraphs (d) – (h) relate to ground 3(a) and are considered under that heading. Subparagraph (i) relates to ground 1(g) and is considered under that heading. As ASIC argued, the appellant did not contend that the solicitors acted otherwise than on the administrators' instructions. The appellant's approach at the hearing was instead to argue that the administrators' conduct, including that engaged in by the solicitors on behalf of the administrators, was appropriate. In those circumstances, the evidence about the appellant's solicitors' conduct upon which the appellant relied does not suggest any error in the primary judge's findings.

Ground 3(a)

[93] Ground 3(a) challenges the primary judge's finding that on 29 April 2013 the appellant informed ASIC that the appellant was not willing to enter into an enforceable undertaking. For that finding the primary judge referred to an affidavit by Ms Hayden. Ms Hayden was special counsel in the chief legal office of ASIC. The paragraph of her affidavit to which the primary judge referred contained a statement that her ASIC colleague, Ms Gubbins, informed her that the administrators' solicitor Mr Russell had just telephoned Ms Gubbins and advised that the administrators were no longer willing to enter into an enforceable undertaking. There was no objection to the admission in evidence of this hearsay statement, but the appellant argued that it had no weight. The appellant also argued that the primary judge failed to have regard to Mr Russell's and Ms Muller's evidence that he was not instructed to refuse any undertaking, and other aspects of Mr Russell's evidence (including that he would have advised against such a course).

[94] The effect of Ms Hayden's hearsay statement was that it was the administrators rather than the appellant who were unwilling to give an enforceable undertaking. Mr Russell gave evidence that he told Ms Gubbins that he did not think that the administrators could sign the enforceable undertaking but the appellant could do so. He did not tell Ms Gubbins that the administrators were not willing to enter into an enforceable undertaking. Ms Gubbins said that the appellant and ASIC could, in view of an adjournment of the Trilogy application, take more time to talk about the terms of the enforceable undertaking. He continued to work on those terms following his discussion with Ms Gubbins on 26 April 2013. After a directions hearing on 2 May 2013 there was a discussion between Ms Muller, Ms Gubbins and himself in which a question was asked about whether, as a result of the trial taking place before the meeting, the enforceable undertaking had fallen by the wayside. Ms Gubbins agreed with that assessment. It was not until 20 May that he learned indirectly that Ms Hayden still wanted the enforceable undertakings.

[95] In Ms Gubbins' affidavit in reply, she did not refer to Mr Russell's evidence and on this topic she said only that Mr Russell told her on 26 April 2013 that the administrators had some concerns about signing an enforceable undertaking but were happy to sign some other form of public undertaking. (That is similar to evidence which Ms Hayden gave in her affidavit that on 29 April 2013 Ms Gubbins informed her that Ms Gubbins had spoken to either Ms Muller or one of Ms Muller's lawyers who had told Ms Gubbins that "she and/or [the appellant]...does not want to sign an EU due to the negative connotations, but is willing to sign a public undertaking in some other form..."[103]). Ms Muller gave evidence to similar effect; she did not ever give instructions that the administrators were unwilling to sign an

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103 Affidavit of Ms Hayden, at [31](b)(i), AB 2293.

enforceable undertaking, as a result of the conversation on 2 May 2013 she understood that ASIC no longer required an enforceable undertaking; and she did not become aware until 20 May 2013 that ASIC still sought an enforceable undertaking from the appellant. In cross-examination, Ms Gubbins accepted Mr Russell's and Ms Muller's versions of the conversation which occurred after the directions hearing on 2 May 2013.

[96] This evidence is inconsistent with the primary judge's finding that on 29 April 2013 the appellant informed ASIC that the appellant was not willing to enter into an enforceable undertaking.

Grounds 3(b) and (c)

[97] Ground 3(b) contends that the error identified in ground 3(a) vitiated the primary judge's conclusion that Ms Muller's statement in an affidavit of the administrators' desire to "ensure that our conduct of [the appellant] was, to the extent possible, satisfactory to ASIC..." and that "...Mr Park and I have been discussing with ASIC a proposal for undertakings to meet any concerns of ASIC and any (bona fide) concerns of members in relation to the conduct of the Fund" were not "consistent with the reality of the [appellant's] interactions with ASIC".[104] That should not be accepted. The primary judge's conclusion was amply supported by the findings that although ASIC had sought the administrators' comments and amendments to the draft enforceable undertaking forwarded by ASIC on 24 April 2013, instead of the appellant responding to ASIC as it had foreshadowed, on 26 April 2013 the appellant adopted a circuitous and technical approach to convene the meeting without reference to any underlying investor for the purpose of putting resolutions which differed from those discussed with ASIC and it did not give to ASIC the material sent to members.

[98] Ground 3(c) contends that errors identified in "paragraph 1 above" affected the primary judge's findings in relation to the 13 June 2013 meeting upon which the primary judge's conclusion depended. This contention fails for the reasons given in relation to grounds 1 and 3(b).

Ground 4

[99] Ground 4 contends that, for the reasons set out in grounds 4(a) – (f) the primary judge's conclusion that the administrators had preferred their own commercial interests to the interests of the Fund was in error because it was based upon errors in findings adverse to the appellant about its conduct in the litigation.

[100] I note that the respondents did not address arguments against most of these contentions.

Ground 4(a): introduction

[101] Ground 4 (a) contends that the conclusion that the appellant conducted the litigation in a combative and partisan way reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members was not put to either of the administrators or any other witness, it did not have regard to the matters in ground 2(h),[105] and was not the proper inference to be drawn from the evidence.

[102] I will return to ground 4(a) after discussing the findings challenged in grounds 4(b) – (f).

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104 [2013] QSC 192 at [62].

105 The ground refers to "1(h)". There is no ground 1(h).

Ground 4(b)

[103] Ground 4(b) contends that the primary judge erred in finding that it was not argued that Trilogy had published false or misleading statements because (4(b)(i)) the appellant adduced evidence of such statements and (4(b)(ii)) the appellant made submissions at the trial.

[104] The relevant finding was that Ms Muller's statement in one of her affidavits that Trilogy made false or misleading statements was a serious allegation made against professional people which was not supported in argument at the hearing.[106] Ms Muller's statement was that "numerous statements" in material circulated by Trilogy and its solicitor "are either false or misleading".[107] The appellant argued that it did advance argument in support of this evidence in paragraphs 134 and 135 of its written outline at the trial.[108] ASIC pointed out, however, that those paragraphs referred to only one allegedly misleading statement made on 17 May 2013,[109] which was after the date (2 May 2013)[110] when Ms Muller swore her affidavit. There was no error in the finding challenged in grounds 4(b)(i) and (ii).

[105] However, Ground 4(a) raises an issue about the use of that finding in relation to the primary judge's conclusion that the appellant conducted the litigation in a combative and partisan way which was reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members. It was not put to Ms Muller (or any other witness) that the error in the statement in Ms Muller's affidavit was indicative of the administrators preferring their own interests to the members' interests. That was far from being an obvious conclusion.

[106] In [44](f) of these reasons I noted that the finding that the appellant's conduct in the litigation was combative and partisan was foreshadowed in the following paragraphs of ASIC's outline delivered before the hearing:

> "[15](b)...the administrator's [sic] level of engagement in the adversarial process of this proceeding is surprising...".
>
> "[47] The [appellant] has...resisted [the first respondents' application]...in a partisan manner".
>
> "[48] ASIC is concerned that the zealousness [sic] of the [appellant's] conduct of this proceeding, exemplified by the volume of material filed on behalf of the [appellant] and the scope of the issues sought to be agitated, is disproportionate to the extent to which the interests of unitholders of the scheme are likely to be advanced."
>
> "[50] ... It is surprising therefore that the administrators have been so strenuous with the First Respondent's defence to Trilogy's challenge to its position as responsible entity.
>
> [51] An example of that strenuousness can be found in the commission and preparation, on behalf of the administrators by their solicitors, of the affidavit of Bradley Vincent Hellen... That affidavit, and the report exhibited to it was, in the circumstances in which it was prepared, never likely to provide much assistance to the Court given:

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106 [2013] QSC 192 at [93].
107 Affidavit of Ms Muller, at [68], AB 720.
108 AB 2477 – 2478.
109 AB 1093.
110 Affidavit of Ms Muller, AB 723.

> a. the limited information upon which the opinions expressed in the report were based; and
> b. the limited relevance of the assumption upon which those opinions were predicated, namely the "maturity" of a contingent liability that was the subject of proceedings in this Court in respect of which judgment had at that time been reserved by Applegarth J. ..."

[107] Some of those paragraphs were expressed too generally to amount to the notice required by the rule in *Browne v Dunn* about serious allegations in the circumstances of this case. No paragraph in ASIC's outline advocated the particular finding challenged in ground 4(b). So far as I can tell, the appellant also had no notice before the judgment was delivered that the primary judge might rely upon such a finding for a conclusion that the administrators were acting in their own interests rather than in the members' interests.

[108] It follows that the rule in *Browne v Dunn* was contravened in that respect: see [39] – [40] of these reasons. The imputation that the error in the allegation in Ms Muller's affidavit suggested the administrators were acting in their own interests rather than in the members' interests was serious. Had it been put to Ms Muller, she might have been able to explain why it should not be accepted. Mr Park and the administrators' solicitor might also have been able to give evidence opposed to the primary judge's conclusion. In these circumstances, the appropriate remedy is to treat the finding challenged in ground 4(b) as supplying no support for the primary judge's conclusion.

Ground 4(c)

[109] Ground 4(c) challenges a finding in paragraph 93 of the primary judge's reasons that Ms Muller's affidavit evidence that Trilogy would not be able to pay a debt of $81 million if litigation about the claimed debt went against Trilogy was "unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions". The grounds of the challenge are that this was not put to Ms Muller and it was not the proper characterisation of her evidence.

[110] Mr Hellen concluded that if Trilogy lost the litigation it would be driven to rely either upon insurance or to seek indemnity from a managed fund of which it was responsible entity. Mr Hellen could not assist upon the question whether those sources would allow Trilogy to pay a judgment of $81 million. Ms Muller deposed that she had reviewed the documents provided to Mr Hellen and his report and that she believed that if judgment went against Trilogy in that litigation "it will be unable to pay that debt...".[111] Ms Muller did not explain in any more detail the basis for that unqualified opinion. She was not asked to do so in oral evidence.

[111] It may be that Ms Muller was not challenged about this evidence because the issue became moot when judgment was given in Trilogy's favour in the relevant litigation. In any event the contention in ground 4(c) that there was no such challenge is correct. Furthermore, although ASIC's outline contended that the appellant had conducted the proceeding in a strenuous, partisan and zealous manner, it did not impute to Ms Muller conduct of that kind in relation to this particular statement in her affidavit. So far as I have been able to discover, no party contended for such a conclusion at the hearing before the primary judge. For

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111 Affidavit of Ms Muller, at [74], AB 721.

reasons similar to those given in relation to ground 4(b), the finding that Ms Muller's affidavit evidence was "unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions" should be set aside.

Ground 4(d)

[112] Ground 4(d) contends that the primary judge's finding in paragraph 94 of the reasons that an affidavit sworn by the appellant's solicitor "was little more than combative and querulous commentary on the litigation" was not put to the solicitor in cross-examination and was not the proper characterisation of the affidavit evidence in light of the application in support of which it was sworn.

[113] ASIC's outline did not make this imputation against the solicitor, it was not put to him in cross-examination and, so far as I have been able to discover, it was not contended for by any party in at the hearing. This finding should be set aside.

[114] In any case, such a finding could not be relied upon to support the primary judge's conclusion challenged in ground 4(a). The appellant filed affidavits in response to the contentions in ASIC's outline about the administrators' conduct in the litigation. Ms Muller was not cross-examined upon the statements in her affidavit sworn on 16 July 2013 that she had "relied entirely on our solicitors for the proper conduct of these proceedings" and she had not instructed them "to increase costs, complicate the proceedings, delay the proceedings, or to conduct the proceedings other than perfectly properly." It was not suggested to her or Mr Park that they endorsed or even knew of the contents of their solicitor's affidavit. Nor was their solicitor, Mr Russell, cross-examined. In his affidavit of 15 July 2013 he denied in detail the contentions in ASIC's outline that the conduct of the proceedings was improper (including in relation to Mr Hellen's report). In the absence of any challenge to that body of evidence, the inference drawn by the primary judge (that the content of the solicitor's affidavit indicated that the administrators conducted the litigation in a combative and partisan way which was reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members) was not open, even if the finding about the character of that affidavit could be sustained.

Ground 4(e)

[115] Ground 4(e) contends that a finding that an affidavit sworn by Ms Muller was characterised by "sniping and argumentative passages" was not the proper characterisation of the affidavit evidence and was in any event irrelevant. The imputation challenged in this ground was not made in ASIC's outline of submissions or in any other submissions at the hearing and it was not put to Ms Muller in cross-examination. She presumably relied upon her solicitor to exclude any irrelevant material from the draft affidavit she executed, and it was necessary for ASIC to grapple with Mr Russell's evidence if it wished to seek this finding. It must be set aside.

Ground 4(f)

[116] Ground 4(f) challenges the primary judge's finding that the appellant did not give any prior notice of a proposal made at the conclusion of the hearing that the ASIC and Shotton application should be dismissed on the administrators' undertaking to do all things necessary to secure independent liquidators to the appellant and to Administration. In support of this ground, the appellant referred to a paragraph in

an affidavit of Ms Muller in which she deposed that if a conflict arose between the appellant and the Fund, the administrators would seek the appointment of special purpose liquidators to the assets of the appellant held in its own right and the appointment of other practitioners as administrators or liquidators of Administration.[112] ASIC did not respond to this argument. It seems that the primary judge overlooked this evidence. This finding must also be set aside.

Ground 4(a): discussion

[117] It follows that none of the findings challenged in grounds 4(b) – 4(f) are available as support for the primary judge's conclusion that the appellant conducted the litigation in a combative and partisan way reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members.

[118] It is then necessary to refer to other findings made by the primary judge as support for that conclusion.

[119] The primary judge made a finding (which related to the finding challenged in ground 4(f)) that it appeared that no consideration had been given to the separate interests of the appellant or Administration or the effect of the order proposed in the appellant's alternative submission upon those companies in terms of wasted costs, for example. The primary judge inferred from that finding that "the administrators were acting without regard to the interests of those companies in order to propose a situation where there could be no possibility of potential conflicts clouding their continuing control of [the Fund]."[113] That inference was not put to the administrators or otherwise foreshadowed at the hearing, so far as I have been able to discover. For the reasons given in preceding paragraphs this finding is not available as support for the primary judge's conclusion challenged in ground 4(a).

[120] The primary judge also made the finding contended for in paragraph [51] of ASIC's outline (see [106] of these reasons) and relied upon that finding as support for the conclusion challenged in ground 4(a). This finding cannot stand against the body of unchallenged evidence summarised in [114] of these reasons. The same applies in relation to the finding that the appellant had filed an affidavit of over 800 pages "which was of such marginal relevance that it was not referred to in either written or oral submissions by any party."[114] This is an example of ASIC's argument in its outline of submissions delivered before the hearing that the volume of material filed on behalf of the appellant exemplified the zeal of the appellant's conduct of the proceeding,[115] but that argument was implicitly abandoned when ASIC decided not to cross-examine any of Ms Muller, Mr Park and Mr Russell upon their evidence to the contrary.

[121] It follows that ground 4 succeeds in relation to all of the findings concerning the administrators' conduct in the litigation.[116] Those findings are not available as support for the primary judge's ultimate conclusions.

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112 Affidavit of Ms Muller, at [36], AB 1065.
113 [2013] QSC 192 at [114].
114 [2013] QSC 192 at [94].
115 Submissions on behalf of ASIC, at [48], AB 2536.
116 [2013] QSC 192 at [89] – [96].

Ground 5

[122] After concluding that the administrators' conduct in the litigation was one of the matters which demonstrated that the administrators had preferred their own commercial interests to the interests of the Fund, the primary judge observed that this extended to the administrators swearing to matters which they either conceded were wrong in cross-examination or which were not consonant with reality.[117] Ground 5 challenges the conclusion on the basis that it was drawn from incorrect findings that the administrators had sworn to matters which they conceded in cross-examination were wrong.

[123] The findings were not incorrect for any reason given in ground 5. My reasons for that conclusion are given in the discussion relating to the notice of contention at paragraphs [148] to [156].

Ground 6

[124] Ground 6 challenges the primary judge's conclusion that the administrators had preferred their own commercial interests to the interests of the Fund. The ground of this challenge is that the primary judge erred in finding that the administrators had sworn to matters which they conceded were not consonant with reality. That finding is said to be vitiated by errors identified in grounds 6(a) – (f).

Grounds 6(a) and (b)

[125] Ground 6(a) and (b) fail because they rely upon challenges made in grounds 2(c), 2(d)(ii), and 3(a) which fail for the reasons given in relation to those grounds.

Ground 6(c)

[126] Ground 6(c) relies upon the challenge in grounds 4(a) and 4(b)(ii). The challenge in ground 4(b)(ii) fails for the reasons given in relation to that ground. Ground 4(a) succeeds, but for reasons given in relation to grounds 6(e) and (f) that does not justify setting aside the conclusion that the administrators had preferred their own commercial interests to the interests of the Fund.

Ground 6(d)

[127] Ground 6(d) contends that a finding that a statement in Ms Muller's affidavit (that her and Mr Park's current understanding was that there were no conflicts which existed or were likely to arise) could not objectively be held was not put to Ms Muller in cross-examination and overlooked the balance of her evidence about how the administrators intended to monitor the acknowledged potential for conflict and deal with conflicts.

[128] Under this ground of appeal the appellant argued that, in referring to Ms Muller's statement that there were no conflicts existing or likely to arise, the primary judge referred only to part of Ms Muller's evidence; reference should also have been made to other statements in which Ms Muller recognised that the current state of affairs might change and that there was potential for conflict to arise. The appellant referred to paragraphs of Ms Muller's affidavit to that effect. Ms Muller implicitly acknowledged in cross-examination,[118] as she had in her affidavit, that conflicts might arise. As was submitted for ASIC, however, the primary judge's challenged

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117 [2013] QSC 192 at [117].

118 Transcript, 15 July 2013, at 1-55.

finding concerned only Ms Muller's unqualified statement that there were no conflicts which existed or which were likely to arise.

[129] The appellant did not argue that there was a contravention of the rule in *Browne v Dunn* in this respect. The finding that Ms Muller's statement that no conflict existed or was likely to arise was wrong and not consonant with reality should not be set aside.

Grounds 6(e) and (f)

[130] Grounds 6 (e) and (f) challenge the primary judge's conclusions that the conduct of the 13 June 2013 meeting, the appellant's interactions with ASIC, and the appellant's conduct in the litigation supported the conclusions that the appellant's administrators would pursue their duties otherwise than independently, professionally and with due care, and might not adequately identify and deal fairly with conflicts if they were to arise. The first basis of each challenge is that the adverse imputations about the administrators' conduct were not put to either of them in cross-examination. The other bases for each challenge are that the conclusion was not the proper inference to be drawn from the evidence and the conclusion did not follow from the premise.

[131] Apart from the primary judge's conclusion about the appellant's conduct in the litigation, the first basis of challenge fails for the reasons given in relation to *Browne v Dunn* and the other bases of challenge fail for the reasons given in relation to other grounds of appeal, particularly ground 1(g).

[132] For the reasons given in relation to ground 4, the primary judge's findings about the appellant's conduct in the litigation are not available as support for her Honour's ultimate conclusions. That does not justify setting aside those ultimate conclusions or the orders challenged in this appeal. The primary judge derived the findings set out in [36] of these reasons from matters which were unrelated to the administrators' conduct in the litigation. The appellant has not established any error in those findings. In the context of the primary judge's conclusions about the potential conflicts which the appellant would face in winding up the Fund, those findings themselves justified the primary judge's ultimate conclusions and the challenged orders.

Ground 7

[133] Ground 7 contends that the primary judge erred in appointing Mr Whyte to take control of the winding up because evidence that he was the liquidator of a company which was a debtor of the Fund established that his appointment placed him in a position of conflict. By the time the appeal was heard Mr Whyte had embarked upon the winding up of the Fund. In an affidavit filed by leave granted at the hearing of the appeal without opposition, Mr Whyte stated that on 20 September 2013 the Court made an order upon his application that he and his partner be removed as liquidators of the relevant companies. The appellant did not argue that Mr Whyte thereafter remained affected by the suggested conflict or any conflict, or that he should be replaced by a different appointee if the appellant failed on its other grounds of appeal. The appellant argued instead that no appointment should have been made under s 601NF(1) for reasons which are articulated in the remaining grounds of appeal. The appellant's arguments upon ground 7 do not justify the Court setting aside the primary judge's orders.

Conclusion

[134] For those reasons the appeal should be dismissed.

[135] Although that conclusion renders it strictly unnecessary to consider the notice of contention, I will explain my conclusions upon that topic.

Notice of contention: conflicts or potential conflicts of interest

[136] Mr Shotton contended that the judgment should be upheld on the ground, which the primary judge had rejected, that conflicts of interest which the appellant would face in winding up the Fund made it necessary to make the order under s 601NF(1) of the *Corporations Act* 2001 appointing an independent person to take responsibility for ensuring that the Fund was wound up in accordance with its constitution. Mr Shotton argued that the primary judge erred in characterising the relevant matters as potential rather than actual conflicts of interest,[119] in holding that "necessary" in the expression "if the Court thinks it necessary to do so" in s 601NF(1) of the *Corporations Act* means "essential",[120] and in failing to find that the matters found by the primary judge empowered the Court to make, and made it appropriate to make, the order.[121] The appellant argued that the primary judge correctly construed s 601NF, that the distinction between actual conflicts and potential conflicts did not correspond with what was and what was not "necessary" for the purposes of s 601NF(1), and that the primary judge's conclusion appropriately gave effect to the relevant factors.

[137] It is useful first to deal with Mr Shotton's arguments about the meaning of the word "necessary" in s 601NF(1). Mr Shotton argued that the primary judge treated *Re Orchard Aginvest Ltd*[122] as authority for the proposition that a real potential for conflicts is not sufficient under s 601NF(1) and as requiring instead that an order is shown to be "essential" for the purpose of the winding up. I accept the appellant's argument that this is not a correct description of the primary judge's reasoning. In *Re Orchard Aginvest Ltd*, Fryberg J accepted that because the particular conflict in issue in that case was "only potential, it may be that the winding-up can be carried out without any conflict actually arising, and therefore the statutory test of necessity can not be satisfied" and that "in all probability" an order under s 601NF(1) could be made only if the order was necessary in the sense of being essential to enable the winding up to occur.[123] The primary judge did not adopt that approach. The primary judge held that the power conferred upon the Court to appoint a person other than the responsible entity to take responsibility for the winding up of a scheme "if the Court thinks it necessary to do so" was "more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so."[124] The primary judge observed that the same view was taken in *Re Orchard Aginvest Ltd*,[125] *Re Stacks Managed Investments Ltd*,[126] *Re Equititrust Ltd*,[127] and *Re Environinvest Ltd*.[128]

[138] It is not necessary to discuss all of the provisions in the *Corporations Act* which use the words "necessary" and "desirable" as alternatives, which were cited for the appellant: ss 961N(1)(b), 983D(1)(a), 1022C(1)(b) and 1323(1). Numerous statutory

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119 Notice of contention, at [3].
120 Notice of contention, at [4](1)–(c).
121 Notice of contention, at [4](d) and [4](e).
122 [2008] QSC 2.
123 [2008] QSC 2 at 8 – 9.
124 *RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192 at [47].
125 [2008] QSC 2 at 8 – 9.
126 (2005) 219 ALR 532 at [50].
127 (2011) 288 ALR 800 at [51].
128 (2009) 69 ACSR 530 at[132] – [133].

provisions confer upon courts discretionary power to make an order where that is "convenient" or "desirable". Another common formulation is used in s 601ND(1)(a), which confers a power to make orders where the Court considers it "just and equitable". The word "necessary" imposes a more stringent test than those other expressions. The appellant submitted that "necessary" bears the ordinary meaning of "that [which] cannot be dispensed with" (as given in the *Macquarie Dictionary*). It may not be very helpful to substitute other words for the words actually used in the provision, but that definition does seem to convey the sense of "necessary" in this provision. That comprehends the situation described in parentheses in the provision where the responsible entity is "not properly discharging its obligations in relation to the winding up". Because a Court acting under s 601NF(1) is more directly concerned, not so much with what has happened in a winding up, but what will happen in a winding up, an order may be made where the Court is satisfied that there is an unacceptable risk that the responsible entity will not properly discharge its obligations in conducting the winding up.

[139] The primary judge referred to three matters as amounting to potential conflicts. Mr Shotton described the first of those matters as requiring the appellant to investigate distributions it made as responsible entity of the Fund to itself as responsible entity of other funds. The appellant was the responsible entity for two of the three feeder funds which were Class B unit holders in the Fund; individual unitholders were in a different class. The matter arose out of disproportionate distributions of Fund money as between Class B unit holders and others. The constitution of the Fund permitted the appellant as responsible entity to "distribute the Distributable Income for any period between different Classes on a basis other than proportionately, provided that the [responsible entity] treats the different Classes fairly."[129] Mr Shotton's argument raised the question whether the different classes of unit holders were treated fairly for the purposes of the constitutional provision.

[140] In the annual report for the Fund for the year ended 30 June 2012, the "statement of comprehensive income" for year ended 30 June 2012 referred to "distributions paid/payable to unitholders" as $17,024,389, with the reference to Note 3(a). The "statement of changes in net assets attributable to unitholders" for the same year attributed $15,959,774 to "units issued on reinvestment of distributions". Note 3(a) referred to a total of "distributions to unitholders" of $17,024,389, made up of $12,318,354 "Distributions paid/reinvested" and $4,806,035 "Distributions payable". Note 3(b) referred to nil distributions "paid and payable" to Class A unit holders and an insignificant amount to Class C unit holders. It referred to $16,904,211 "Distributions paid and payable" to Class B unit holders. The text of the note referred to $5,572,054 distributions payable being related to distributions requested to be paid before 30 June 2012 and that distributions had been suspended from 1 January 2011. The note recorded that the distributions of $16,904,211 were declared to Class B unit holders "to enable the feeder funds to recognise distribution income to match expenses incurred. All feeder funds have reinvested back into the Scheme during the period. Compliance with the Trust Deed and Corporations Act in relation to these distributions is a matter of legal interpretation and the Responsible Entity believes it has an arguable position to support the declaration of these distributions as being fair and reasonable to all classes of unitholders".

[141] Note 10 referred to "related parties". It recorded details of the holdings in the relevant scheme by the appellant and its affiliates. Those holdings had increased

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129 Constitution of the Fund, cl 3.2, AB 1572.

from 44.09 per cent of the total interest in the scheme at 30 June 2011 to 47.07 per cent at 30 June 2012. Thus it appeared that the feeder funds' reinvestments in the scheme of the distributions made to them as Class B unit holders resulted in an aggregate increase of about three percentage points of the total interest in the relevant scheme over the 12 month period. The auditors' report referred to the distributions of $16,904,211 to Class B unit holders described in Note 3, substantially repeated the text I have quoted, and recorded that this was "an area of significant judgment and accordingly, we bring it to your attention."

[142] As Mr Shotton submitted, the accounts suggest that at a time when distributions were generally suspended the appellant in effect distributed substantial amounts of money to itself and did not distribute money to the individual investors, and that the distributions were effected in a way which increased the proportion of the interest in the Fund of the appellant as responsible entity of two feeder funds and correspondingly decreased the proportion of others' interests in the Fund. Mr Shotton contended that the constitutional provision did not authorise that conduct, or at least that the appellant was obliged to investigate that issue, and that gave rise to an actual conflict of interest.

[143] The primary judge concluded that before the administrators were appointed the appellant had faced a conflict between its duties as responsible entity of the Fund and as responsible entity for the feeder funds, the administrators had conceded that the distributions might need to be investigated and might give rise to a claim on behalf of some unit holders of the Fund, and, although Mr Park swore to the contrary in his affidavit, he conceded in cross-examination that undoing the transaction would be difficult because of the reinvestment into the Fund on behalf of the Class B unit holders of almost $16,000,000 of the distribution.[130] The primary judge held that this issue illustrated the potential for conflict between the interests of the feeder funds and the interests of the Fund if one responsible entity had charge of them all and that there was a potential for the same type of conflict to arise again, including in any attempt to undo the 2012 transaction.[131]

[144] Mr Park described the transaction as involving an actual net cost to the Fund of a maximum of about $900,000 (the difference between the dividend declared of $16,900,000 and the units credited on reinvestment of $15,900,000 referred to in Notes 3 and 6). The appellant argued that where the accounts disclosed that the distribution was made because the feeder funds were in need of distributions to match expenses, Mr Park's unchallenged evidence was that the distributions were used by the feeder funds to pay for audit fees, hedging losses and the like, independent accounting and legal advice was taken, the distributions occurred when the Fund was illiquid, and the funded expenses had to be paid, Mr Shotton had not fulfilled his onus of proof of identifying circumstances which suggested that the distributions were unfair. In addition, the appellant argued that it was significant that the transaction had been the subject of independent accounting and legal advice, that the resultant increase in the proportion of units in the Fund held by Class B members was not unfair to other unit holders because the different classes of units did not carry equal rights, that the imbalance could be rectified by similarly disproportionate distributions in favour of the holders of ordinary units, and that the "actual disproportion" involved only a net payment of about $900,000, which was very small in comparison to the net assets of the Fund at that time of about $289,000,000.

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130 [2013] QSC 192 at [103] – [104].

131 [2013] QSC 192 at [105].

[145] However Mr Park conceded that the transaction was "controversial" and did call for an investigation. He agreed in cross-examination that the transaction was "another example of a transaction that, I agree, should be investigated now that it has been (very belatedly) drawn to our attention" and that "[a]s with all other controversial transactions, should a conflict emerge, then we will take appropriate action – independent legal advice and, if the conflict is sufficiently acute, we will approach the Court."[132] That evidence was consistent with the highly qualified terms in which the transaction was described in the notes to the accounts and in the auditor's report. The proposition that the various matters to which the appellant referred in argument established that there was no arguable conflict is not readily reconcilable with the combined effect of the qualifications by the appellant and its auditors in its accounts and Mr Park's concessions in evidence as to the necessity for an investigation of this "controversial" transaction. Nor does the fact, if it be a fact, that the effect of the transactions might be readily capable of remedy if they are found to be inappropriate deny the existence of a conflict in the appellant in one capacity investigating transactions which benefited the appellant in different capacities. The conceded necessity of the appellant as responsible entity of the Fund investigating its own conduct in making payments to the appellant as responsible entity of two feeder funds involved an actual conflict of interest.

[146] The issue is not without significance. After Mr Park referred to the net cost to the Fund as being a maximum of about $900,000 he deposed that, since the Fund had a capital of several hundred million dollars, "these book entries will be relatively easy to reverse, should an investigation show that they were improper; and an overpayment of $900,000.00 to the three Feeder Funds will easily be able to be offset, as the assets are converted to cash and appropriate distributions made."[133] A very different picture emerged in cross-examination. Mr Park then accepted that it was necessary to distribute income in accordance with the unit holdings. He would need to obtain advice about what could be done to take the units back from the funds to whom the units had been issued. He had not formed a view about whether this was merely a book entry. He did not know and he would have to seek advice about the options in relation to unilaterally taking units from others, such as Trilogy. After making those concessions, Mr Park agreed that it was "not relatively easy" to reverse and that this might involve the various funds in litigation with each other.[134] There was no re-examination on that point.

[147] It was that evidence to which the primary judge referred in finding that Mr Park conceded in cross-examination the difficulty of undoing the transactions although he had sworn to the contrary in his affidavit.[135] Ground 5(a) in the notice of appeal contended that the finding was incorrect because the matter upon which Mr Park was cross-examined did not properly reflect the content of his affidavit and it was not put to Mr Park that he had contradicted his affidavit evidence. As to the first contention, the appellant argued that whilst Mr Park's affidavit evidence concerned reversing the net effect of the disproportionate distribution by making offsetting future distributions, the answer in cross-examination concerned the difficulty of reversing the issue of the units, which was the means by which the distribution had been effected. That should not be accepted. The relevant paragraph of the affidavit appeared under a heading "alleged feeder fund conflict". It was Mr Park's

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132 Affidavit of Mr Park, at [13], AB 1516.

133 Affidavit of Mr Park, at [12], AB 1516.

134 Transcript, 16 July 2013, at 2-19, AB 205.

135 [2013] QSC 192 at [104].

response[136] to written submissions by Mr Shotton under a similar heading. Mr Shotton's submissions concluded that if the appellant were left to wind up the Fund and to act as responsible entity for each of the other feeder funds, it "will have the same possible feeder fund conflicts that Trilogy may have, described above at paragraphs 30, 31 and 32... as each feeder fund participated in the disproportionate distribution of $16.9 million as at 30 June 2012".[137] The cited paragraphs referred to both the approximately $900,000 of distributed funds which were not reinvested and the dilution of the interests of Class A and C unit holders and the corresponding increase in the interests of the Class B unit holders.[138] Mr Park's affidavit thus conveyed that the transaction about which Mr Shotton complained – which included the allotment of the units – could be reversed relatively easily. That proposition was unequivocally contradicted by Mr Park in cross-examination.

[148] The second proposition in ground 5(a) is also wrong. Mr Park's affidavit comprised only 22 substantive paragraphs and it was sworn on the day preceding the cross-examination. The cross-examiner directed Mr Park's attention to the paragraph in which Mr Park had asserted that the book entries would be relatively easy to reverse. That Mr Park understood he was being challenged about the accuracy of that assertion is evident from his own answer to a different question about the same paragraph, in which Mr Park referred to what was "outlined in" that paragraph.[139] The immediately following question elicited the answer about the possible reversal of the relevant transaction that it was "not relatively easy".

[149] This matter involved the appellant in a position of actual conflict by reason of its accepted obligation to investigate transactions between itself in one capacity and itself in different capacities, but it is not possible to decide upon the limited material before the Court whether or not the investigation would reveal grounds for taking action or whether it ultimately would prove relatively easy to reverse the effect of the transactions if that were required. (The appellant posited that the transactions could be reversed by making further disproportionate issues of units to reverse the effect of the impugned issues of units.) As to the significance of the issue, the amounts involved are significant but they are not large in the context of this very substantial administration.

[150] As to the second matter found to amount to a potential conflict, the primary judge made the following succinct findings:

> "...In both 2011 and 2012 the fund paid around $5 million to the first respondent as "loan management fees". There may be a question as to the legitimacy of these payments under the constitution of [the Fund], as they seem to be in addition to management fees, and on their face do not seem to have been expenses. Once again the administrators have not yet formed a concluded position as to this, but acknowledge the potential for an overpayment, and acknowledge that the process of reversing the entries may prove to be complex, though again Mr Park originally swore to the contrary."[140]

[151] Under 5(b) in the notice of appeal the appellant contended that the finding in the last sentence was not the proper inference to be drawn from the evidence and that the

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136 See Affidavit of Mr Park, at [4], AB 1514.
137 Mr Shotton's outline of submissions, 14 July 2013, at [47], AB 2520.
138 Mr Shotton's outline of submissions, 14 July 2013, at [31] – [33], AB 2514 – 2515.
139 Transcript, 16 July 2013, at 2-19, AB 205.
140 [2013] QSC 192 at [106].

primary judge did not take into account Mr Park's evidence in re-examination and documents to which he referred in re-examination.

[152] Mr Park's affidavit made it plain that he had not been able to gain a proper understanding of these transactions and did not defend or impugn them, but he believed that, like the distributions of income that were declared, management fees amounting to $9,100,000 were declared but not paid. Mr Park deposed that if the fees were not properly charged, "it will be a relatively simple matter of righting the situation." After the cross-examiner referred Mr Park to the relevant paragraph of his affidavit, and asked some questions about that, the following exchange occurred:

> "Well, you said it's a relatively simple matter of righting the situation. Tell me the relatively simple matter? --- Obtaining legal advice.
> Well, judging by the...? --- It's a play on words, yes."[141]

[153] Although the cross-examination had focussed upon the "loan management fees" of about $5,000,000 paid to the appellant to which the primary judge's finding referred, rather than upon the additional "management fees" of about $9,100,000, the terms of Mr Park's answer plainly justified the primary judge in taking this evidence into account adversely to the appellant.

[154] The accounts recorded that the "[m]anagement fees" were "paid or payable" to Administration and that the "[l]oan management fees" were "paid" to the appellant "for loan management and receivership services provided by the Responsible Entity on behalf of the Scheme in replacement of appointing external receivers. Those fees are charged directly to the borrower to facilitate future possible recovery."[142] The appellant argued that it emerged in re-examination that the account which had been shown to Mr Park were prepared on an accruals rather than a cash basis and that the evidence of the cash accounts revealed that the relevant amounts had not been paid. The directly relevant question in re-examination was whether a page of the accounts headed "Statement of Cash Flows" showed that a sum of $9,100,000 had been paid by way of management fees to anyone; Mr Park answered that it did not.[143]

[155] As is apparent from the terms of the primary judge's finding, the issue upon which Mr Park was cross-examined instead concerned the total amount of about $5,000,000 (recorded in the accounts as about $4,800,000) for "loan management fees" that were "paid" by borrowers to the appellant in addition to the "management fees" of about $9,100,000 that was "paid or payable" to Administration. It was in relation to the approximately $4,800,000 "loan management fees" that Mr Park acknowledged that "they're in addition to the management fee, which gives us cause for concern". Mr Park's evidence in re-examination that the accounts did not show the $9,100,000 as having been paid did not detract from his evidence in cross-examination that he was not throwing doubt on whether the amounts about which he was cross-examined had been paid.[144] The re-examination did not deal with those amounts. In the result, the arguments under appeal ground 5(b) disclosed no error in the primary judge's reasons.

[156] The evidence before the primary judge suggested at least a potential conflict between the appellant's interest in retaining the loan management fees of about

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141 Transcript, 16 July 2013, at 2-21, AB 207

142 LM First Mortgage Income Fund Annual Report for the year ended 30 June 2012, at 5, AB 1679.

143 Transcript, 16 July 2013, at 2-26.

144 Transcript at 2.21.

$4,800,000 paid to itself – a company in administration and apparently destined for liquidation – and its duty to investigate those payments. The appellant argued that there was no conflict for four reasons: s 601FC(1)(c) and s 601FC(3) provided that the interests of the members took priority over the interests of the responsible entity; payment of all fees (including the management fees and loan management fees) were outside the related party provisions of Chapter 2E as modified by Part 5C.7 (particularly s 601LC(3) and s 601LD); the total of the impugned fees ($13.9 million) did not exceed the amount of 5.5 per cent of the Net Fund Value of $288,980,628 ($15,893,934) authorised by the constitution; and because the fees were authorised by the constitution, their payment or non-payment could not create a conflict. The first two propositions, that by statute the interests of members take priority over the interests of the appellant and that the fees are outside the related party provisions, do not deny the possibility of a conflict in relation to the fees. The third and fourth propositions do suggest that there was no conflict such as might justify relieving the administrators of responsibility for the winding up. Any conflict involved in a responsible entity charging fees authorised by the constitution is inherent in the scheme of the Act. However, it would be necessary in that respect to consider the reduction of the fee mentioned in the constitution from 5 per cent to 1.5 per cent, the absence of up to date valuations with reference to which the fee could be charged, and the effect of the decision or agreement by the administrators that they would charge their usually hourly rates rather than management fees.[145]

[157] It is not necessary to reach any final conclusion about this topic. The primary judge did not express any firm conclusion about it, but referred to the administrators' acknowledgement of a potential for overpayment and observed only that there "may be a question" about the legitimacy of the payments.[146] On the limited state of the evidence that was the correct conclusion. Mr Shotton's contention that this matter should be characterised as an actual conflict of interest rather than a potential conflict of interest should not be accepted.

[158] The primary judge dealt with the third matter concerning conflicts in the following passage:

> "Under the constitution of [the Fund] the responsible entity is entitled to a management fee of up to 5.5 per cent per annum of the value of the assets of the fund. The administrators swear that they will not pay the [appellant] this management fee from [the Fund]. There would no doubt be difficulties and expense involved in valuing, and throughout the course of a winding-up, revaluing, the assets of [the Fund] in order to calculate the management fee, but it would not be impossible. In circumstances where both the first respondent and [the Fund] are being wound up and there is doubt as to the solvency of both, there is at least a potential conflict to be resolved between the desire of the creditors of the [appellant] and the interests of [the Fund].
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> ...

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145 In the final submissions for the appellant, senior counsel observed that the management fee of 5.5 per cent was unexceptionable in legal terms because it was in the constitution, but the fee was practically excessive, as was demonstrated by the fact that the appellant had voluntarily reduced the fee to 1.5 per cent before the administrators were appointed – but even that amount could not be justified on a commercial basis because there were not up to date valuations for all the properties, so something else had to be done instead of charging a percentage of value.

146 [2013] QSC 192 at [106].

> The evidence as to what the administrators will do as to this fee is rather vague and not adequately documented. While the administrators say they have "agreed" not to charge a management fee, I do not know who that agreement was with. I am not convinced that any arrangement they have made in relation to management fees would be sustainable if there were real pressure exerted by creditors of the [appellant]."[147]

[159] This topic was not discussed in the oral submissions for Mr Shotton. His written outline substantially repeated the primary judge's reasons and asserted that there was a conflict between the administrators' decision that they would not pay a management fee to the appellant and the interests of the appellant's creditors. That suggests that the administrators may have preferred the unit holders' interests over the interests of the appellant's creditors in the appellant being paid fees to which it was entitled. It is difficult to see how Mr Shotton could legitimately complain about that in circumstances in which, as was pointed out for the appellant, it was Mr Shotton's own solicitor who suggested to Ms Muller, who agreed, that the appellant should not charge the management fees but should charge only at an hourly rate.[148] There was no error in the primary judge's comment that this arrangement was vague and not adequately documented – Mr Park agreed that there was no resolution or minute to that effect and it arose only out of discussions[149] – but Mr Shotton's contention in this appeal that the transaction itself, or the possibility that it might be challenged by the appellant's creditors (or shareholders), involves the administrators being in a position of actual conflict is unsustainable.

[160] Accordingly, the only transaction which might properly be described as involving the appellant in a position of actual conflict is the first matter, and then only to the extent that the appellant acknowledged its obligation to investigate transactions involving distributions of some $17 million, part of which was distributed to the appellant in different capacities, and apparently involving a maximum net cost to the Fund of about $900,000. The primary judge did not describe the necessity to investigate the transactions as involving an actual conflict, but did refer to the possible need for investigation and the possibility that it might give rise to a claim on behalf of some unitholders of the Fund.[150] My limited acceptance of the contentions made for Mr Shotton does not justify the conclusion that the primary judge was in error in finding that the real potential for conflicts of interest to rise in the future did not of itself make it "necessary" to appoint a person other than the responsible entity under s 601NF(1). Any liquidator's task is likely to involve dealing with conflicts of interest which might arise from time to time, including in the adjudication of claims, and it might be possible to manage potential conflicts through undertakings and directions should those conflicts arise.[151]

[161] Mr Shotton's arguments under the notice of contention should not be accepted.

Proposed orders

[162] The appeal should be dismissed. The appellant should be ordered to pay the respondents' costs of the appeal.

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147 [2013] QSC 192 at [101], [102].
148 Affidavit of Ms Muller, at [46], [49], AB 1067, 1068.
149 Transcript, 16 July 2013, at 2-14, AB 200.
150 [2013] QSC 192 at [104].
151 See [2013] QSC 192 at [115].

[163] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[164] **DAUBNEY J**: I respectfully agree with Fraser JA.